IN THE

# Supreme Court of the United States

October Term, 1975

No. .....75-666

COFFEE-RICH, INC., a Delaware corporation, and RICH PRODUCTS CORPORATION, a Delaware corporation,

*Appellants,*

*vs.*

JERRY W. FIELDER (appointed as Successor to RICHARD LYNG), as Director of Agriculture of the State of California; R. L. VAN BUREN, as Chief of the Bureau of Dairy Service of the Department of Agriculture of the State of California; L. H. LOCKHART, as Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California,

*Appellees.*

**On Appeal From the California Court of Appeal, Second Appellate District, Division One.**

## JURISDICTIONAL STATEMENT.

ELLIS ARNALL,
Fulton Federal Building, Tenth Floor,
Atlanta, Georgia 30303,
(404) 577-5100,
*Attorney for Appellants.*

*Of Counsel:*
ARNALL, GOLDEN & GREGORY,
Tenth Floor,
Fulton Federal Building,
Atlanta, Georgia 30303,
(404) 577-5100,

EDWIN FRESTON,
LOUIS W. MYERS, II,
MARK A. SPRAIC, of
ARGUE, FRESTON & MYERS,
626 Wilshire Boulevard,
Los Angeles, Calif. 90017,
(213) 628-1291.

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**On Appeal From the California Court of Appeal, Second Appellate District, Division One.**

## JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the California Court of Appeal, Second Appellate District, Division One, entered June 9, 1975 (a timely petition for hearing being denied in the California Supreme Court on August 6, 1975), affirming the judgment of the Superior Court of the State of California for the County of Los Angeles, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## Opinion Below.

The opinion of the California Court of Appeal, Second Appellate District, Division One, is reported in 48 Cal. App. 3d 990 and 122 Cal. Rptr. 302. Copies of the opinion and judgment of the Court of Appeal and the Findings of Fact and Conclusions of Law of the Superior Court, are appended hereto.

## Jurisdiction.

This suit was brought under California Code of Civil Procedure Sections 526 and 1060 for declaratory and injunctive relief to determine the inapplicability and unconstitutionality of certain California statutes and to enjoin application to products manufactured by appellants. The judgment of the Court of Appeal upholding portions of the statutes asserted by appellants to be unconstitutional and a construction of the statute asserted to be unconstitutional under the United States Constitution was entered June 9, 1975, a timely Petition for Rehearing was filed on June 24, 1975 and denied on July 3, 1975; a timely petition for hearing in the California Supreme Court, filed July 18, 1975, was denied on August 6, 1975. A Notice of Appeal to this Court was filed in the California Court of Appeal on October 9, 1975.

The jurisdiction of the Supreme Court to review the decision of the Court of Appeal by direct appeal is conferred by Title 28, United States Code, Section 1257, (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment by appeal: *Standard Oil Co. of California v. Johnson,* 316 U.S. 481, 482 (1942); *Reconstruction Finance Corp. v. Beaver County,* 328 U.S. 204, 206 (1946); *Winters v. New York,* 333 U.S. 507, 509 (1948).



Appellants also assert denial by the judgment of the Court of Appeal of rights secured to appellants by the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. Certiorari jurisdiction to review such questions is secured to appellants by Title 28, United States Code, Section 1257, (3). Such questions may be properly raised in a jurisdictional statement on appeal under the authority of *Cox Broadcasting Corp. v. Cohn,* ..... U.S. ....., 43 L. Ed. 2d 328 (1975), and cases cited therein, note 14; Title 28, United States Code, Section 2103.

## Statutes Involved.

Chapter 1250 of Statutes and Code Amendments of 1968, Regular Session of the State of California ("Chapter 1250") adding sections to the California Food and Agricultural Code. Chapter 1250 is appended hereto.[1]

The Fourteenth Amendment to the United States Constitution, Section 1, applicable in this appeal, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[1]Subsequent to the enactment of Chapter 1250, the name of the California "Agricultural Code" was changed to "Food and Agricultural Code." Cal. Stats. 1972, c. 225. References will be made to that Code as it is now known.

The First Amendment to the United States Constitution, applicable in this appeal, provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

**Questions Presented.**

1. May a state court consistent with due process deny a litigant the right to assert and establish that its products do not fit within a statutory definition for regulation, refuse to make a finding with respect to such question but nevertheless subject those products to such regulation?

2. May a state consistent with equal protection assert and establish the impropriety of an evidentiary test for determining inclusion of a product for statutory regulation in one court proceeding and in another concurrent court proceeding under the same statute and with respect to similarly situated products, concealing its diametrically opposed position in the second court from the first court?

3. Is regulatory statute containing penal sanctions sufficiently certain to satisfy due process requirements of the Fourteenth Amendment to the United States Constitution where that statute is so vague and indefinite that its meaning cannot be ascertained, different state courts are unable to construe and apply the statute in a consistent manner and where the State Attorney General is unable to take a consistent position with respect to the interpretation of that statute?



**Statement of the Case.**

This is the second appeal to this Court in this case. A prior appeal (No. 72-1112) was filed following an earlier opinion of the California Court of Appeal reported in 27 Cal. App. 3d 792, 104 Cal. Rptr. 252.[2] *Coffee-Rich I* remanded the case to the trial court for preparation of modified findings of fact consistent with the opinion. (27 Cal. App. 3d at 819; 104 Cal. Rptr. at 271.) The original appeal to this Court, while somewhat interlocutory in nature, involved certain collateral questions not here presented and was dismissed for want of substantial federal question. 411 U.S. 979 (1972).

Appellants manufacture in the State of New York, and sell in interstate commerce certain wholesome and nutritious food products known as "Coffee-Rich," "Rich's Whip Topping" and "Spoon n' Serve." The first product is a coffee creamer, added to coffee to cool and whiten it as well as enhance its flavor. The latter two products are whipped toppings designed as garnishes and fillers for pies, desserts and the like. These products, which have been shipped in interstate commerce into the State of California for many years, contain no milk or milk components. They are economically competitive with certain dairy products which also serve some of the functions of appellants' products.

In 1968, the California Legislature enacted Chapter 1250 in an attempt to comprehensively regulate the manufacture and sale of products described therein

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[2]For ease of reference the earlier opinion of the Court of Appeal will be referred to as *Coffee-Rich I* and the later opinion as *Coffee-Rich II*.

as "products resembling milk products." Section 38912,[3] enacted in Chapter 1250, defines a product resembling a milk product as a food (with certain exceptions) which has:

> "the appearance, taste, smell, texture or color of a milk product and which, taken as a whole, bears resemblance to a milk product, or could be mistaken for a milk product."

Appellants filed this suit against officials of the California Department of Agriculture charged with the enforcement of Chapter 1250. The complaint sought a declaration in the alternative that appellants' products were not factually within the coverage of Chapter 1250 or if described by Chapter 1250, the statute was unconstitutional in its application to appellants in a number of particulars.

At the trial, the court took evidence in the form, *inter alia*, of samples of appellants' products. The defendant officers of the California Department of Food and Agriculture objected to any form of comparison between appellants' products and milk products by the trial court. This objection was overruled.

The trial court made the following original finding of fact:

> "16. When compared to and alongside of milk products, plaintiffs' products have distinctive differences in appearance, taste, odor, color and texture." (Appendix E, p. E-16.)

On concurrent appeals in *Coffee-Rich I*, appellants asserted that this finding established that the first half of Section 38912 (set out above, page 6) was not

[3]Unless noted otherwise, all statutory references are to the California Food and Agricultural Code.



satisfied and that appellants' products were therefore not "products resembling milk products." Appellee State officers, on the other hand, complained that the finding of fact was improper because it was based on a comparison test.

*Coffee-Rich I* reversed the judgment of the trial court, holding the comparison test improper, and remanded the case, saying (27 Cal. App. 3d at 801-02, 104 Cal. Rptr. at 258):

> ". . . Finding 16 is a far narrower test than that envisaged by the Legislature. A test so engrafted upon and not warranted by Chapter 6 is outside the issues and must be disregarded."[4]

On remand, the trial court modified its findings of fact with respect to the physical characteristics of appellants' products in issue and found:

> "14. 'Coffee-Rich' in hard-frozen form or said hard-frozen product as thawed (but not powdered 'Coffee-Rich'), 'Rich's Whip Topping,' 'Sundi-Whip' and 'Spoon n' Serve,' each, when ready to be consumed, taken as a whole, could be mistaken for a milk product, although *plaintiffs' products have distinctive differences from milk products in appearance, taste, odor, color or texture,* and each of said products is therefore subject to Chapter 1250." (Emphasis added). Appendix D, p. D-6.)

[4]The court also speculated about probable organoleptic similarities between appellants' products and milk products although appellants' products in evidence were never presented to the Court of Appeal. Such speculation as to facts where the evidence is disputed, as it was here, is not binding on the trial court on remand under California law. *Allen v. Bryant*, 155 Cal. 256, 263, 100 Pac. 704 (1909); *Wallace v. Sisson*, 114 Cal. 42, 45, 45 Pac. 1000 (1896).

On concurrent appeals in *Coffee-Rich II*, appellants urged that the trial court had now made a proper finding of fact with respect to appearance, taste, etc., and under the conjunctive definition of Section 38912, appellants' products were not within coverage of Chapter 1250. Appellees asserted that the finding with respect to these characteristics was erroneous.[5]

*Coffee-Rich II* struck the portion of modified finding 14 emphasized above and retained the legal conclusion that appellants' products are within the scope of Chapter 1250, stating:

> ". . . The language of new finding of fact 14 of the distinctive differences between Coffee-Rich and milk products represents such a material change from old finding 16 as to constitute a new finding inconsistent with the scope of the trial court's jurisdiction on remand." (Appendix A, p. A-9.)

Thus, *Coffee-Rich II* left standing a decision that most (but not all) of appellants' products are subject to the regulatory requirements of Chapter 1250 although there is no finding in the record of whether the products meet the requirements of appearance, taste, smell, texture or color essential to a factual determination of whether the products fulfill the statutory definition (note 5).

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[5]The case was tried on the theory that the definition was conjunctive. That is, the products must have (1) the appearance, taste, smell, texture or color of a milk product and (2) either resemble a milk product or have the potential of being mistaken for one. *Coffee-Rich I* appears to have accepted this construction as well. (27 Cal. App. 3d at 804, 104 Cal. Rptr. at 260.) The trial court did find the posssibility of mistake, and this second one-half of the definition has been fulfilled. Only the first one-half of the statute is in issue.



*Coffee-Rich II* made this ruling and affirmed the judgment as modified although the court noted that ". . . the conclusion does not come easily in view of the remanding language in *Coffee-Rich I* . . ." (Appendix A, p. A-14.)

Appellants in their Petition for Rehearing and in their Petition for Hearing in the California Supreme Court asserted that the procedure followed by *Coffee-Rich II* subjected appellants to a denial of procedural due process guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution. Those petitions were denied.

During the pendency of *Coffee-Rich I*, there was also pending in the Alameda County Superior Court in Northern California, an action entitled *Tip Top Foods, Inc. v. Lyng*, involving the application of Chapter 1250 to certain food products similar to appellants' products. That action was tried two months after *Coffee-Rich I* and before judgment was entered by *Coffee-Rich I* trial court and resulted in a reported decision in 28 Cal. App. 3d 533, 104 Cal. Rptr. 718 (November 6, 1972). *Tip Top* discloses that while the appellee State officers here objected to the use of comparisons and persuaded *Coffee-Rich I* to adopt their views, those same defendants in *Tip Top* willingly and without objection participated in comparison tests at trial for the purpose of determining coverage. Further, these same defendants had themselves engaged in comparison tests to determine whether they would assert that the *Tip Top* products were subject to Chapter 1250—the administrative state action that led to the filing of *Tip Top*.

The appellees did not disclose to the trial or appellate courts in *Coffee-Rich I*, that they had taken a

diametrically opposed position on the same issues in *Tip Top*. Because the comparisons of products were not in issue in *Tip Top*, they were not disclosed in the reported decision therein. Appellants learned of the denial of equal treatment by the State officials approximately ten days before the first brief in *Coffee-Rich II* was due to be filed. (See Appendix F, p. F-1.) In that first brief the attention of the *Coffee-Rich II* court was called to the *Tip Top* situation by affidavit and relevant portions of the *Tip Top* record were presented to the California Court of Appeal.[6] It was there asserted that this conduct constituted a denial to appellants of equal protection under the Fourteenth Amendment to the Federal Constitution. *Coffee-Rich II* ignored appellants' assertion.

Appellants reasserted this "denial to plaintiffs of equal protection under the Fourteenth Amendment to the United States Constitution," in their Petition for Hearing before the California Supreme Court. That Court refused to hear the case.

In addition to the inconsistent state action of appellees in *Coffee-Rich I* and *Tip Top* with respect to the proper evidentiary approach, the two *Coffee-Rich* appellate courts which have faced the problem have taken different positions. As will be more fully discussed below, the appellee State officers and their counsel, the Attorney General of the State of California have also been unable to enunciate a consistent interpretation with respect to the definition contained in Section 38912.

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[6]Under California law this procedure is appropriate to require the court to judicially notice the action in *Tip Top*. California Evidence Code Sections 452, 453; *Flores v. Arroyo*, 56 Cal. 2d 492, 496, 364 P. 2d 263 (1961).



Appellants have asserted from the beginning of this case that Chapter 1250 and the definition contained in Section 38912:

> ". . . violates the 14th Amendment of the Constitution of the United States . . . and thereby deprives plaintiff of its liberty and property without due process of law and is so vague and indefinite that it is incapable of proper administration . . ." (Complaint, para. 14.a, p. 9.)

In the context of the decision in *Coffee-Rich II*, appellants have continued to assert that denial of due process in both the Petition for Rehearing of *Coffee-Rich II* (where the foregoing provision of the complaint was quoted) and thereafter in their Petition for Hearing in the California Supreme Court.

Appellants asserted in the Petition for Hearing after discussing the actions of the courts and parties:

> "Such uncertainty demonstrates that the Act is unconstitutionally vague and denies plaintiffs due process of law assured by the Fourteenth Amendment. *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

Both petitions were denied.

In *Coffee-Rich I* the California Court of Appeal in a decision full of asides and dicta remanded the case for further proceedings "consistent with this opinion." The trial court in exercising its discretion on remand[7] attempted to interpret and apply *Coffee-Rich I* and make accurate findings of fact on all es-

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[7]Under California law the remand vested discretion in the trial court. *Harris v. Hensley*, 214 Cal. 420, 422, 6 P. 2d 253 (1931).

sential issues. In reviewing those findings *Coffee-Rich II* was highly critical of *Coffee-Rich I*, noting that the trial court was faced ". . . with the need to interpret the first opinion unaided by knowledge of what was in the minds of the panel members when it was promulgated." (Appendix A, p. A-8.)

Yet, *Coffee-Rich II* has left the problem of an orderly application of Chapter 1250 in a worse shambles than when the case commenced in 1968.

## The Questions Are Substantial.

**1. The California Court of Appeal Has Denied to Appellants the Right Guaranteed by the Due Process Clause of the Fourteenth Amendment to Present Competent Evidence to Decide Whether Appellants' Products Fall Within the Statutory Definition of Statutory Regulation and Has Determined That the Products Are Subject to Such Regulation Without a Factual Determination of Whether the Products Fit the Definitional Test.**

Throughout this case, the primary question presented is whether appellants' products are "products resembling milk products" as defined in Section 38912 for the purpose of subjecting those products to the penal regulations of Chapter 1250.[8]

Appellees early stated the basic interpretation of Section 38912 with respect to the factual coverage of questioned products:

> "Section 38912 demonstrates its inclusive nature. It calls basically for a two part test. First the

[8]Section 32901 (Appendix C). And Section 35281, which applies to the regulations of Chapter 1250 provides: "Any violation of any provision of this division, or the regulations for its enforcement, is a misdemeanor. Unless a different penalty is specifically prescribed, it is punishable by a fine of not less than twenty-five dollars ($25) nor more than five hundred dollars ($500), or by imprisonment in the county jail not less than 10 days nor more than 90 days, or by both."



> material must have the appearance, taste, smell, texture or color of a milk product, and second, it may *either* bear resemblance to a milk product or be mistaken for one." (Emphasis in original.) [Supplemental Clerk's Transcript in *Coffee-Rich I*, p. 16.]

The trial court's only finding with respect to the first part of that definition was:

> "16. When compared to and alongside of milk products, plaintiffs' products have distinctive differences in appearance, taste, odor, color, and texture." (Appendix E, p. E-7.)

*Coffee-Rich I* held that finding improper because based on a comparison test and struck the finding (27 Cal. App. 3d at 801-02, 104 Cal. Rptr. at 257-58). *Coffee-Rich I* agreed with the conjunctive test. (27 Cal. App. 3d at 804, 104 Cal. Rptr. at 260.)

The case was "remanded with directions to modify the findings of fact, conclusions of law and judgment (permanent injunction) in terms consistent with this opinion." (27 Cal. App. 3d at 819, 104 Cal. Rptr. at 271.) As the Court of Appeal in *Coffee-Rich II* noted, the trial judge on remand was faced "with the need to interpret the first opinion [*Coffee-Rich I*] unaided by knowledge of what was in the minds of the panel members when it was promulgated." (Appendix A, p. A-8.)

On remand, the same judge who tried the case heard extensive argument and considered several sets of pro-

posed findings of fact with respect to the organoleptic characteristics of appellants' products.

Appellants proposed a finding similar to the one adopted by the trial court. [Clerk's Transcript in *Coffee-Rich II*, p. 98.]

Appellees proposed the following:

> "12. Coffee-Rich, when ready for consumption, *has the appearance, taste, smell, texture or color of a milk product,* and when taken as a whole could be mistaken for a milk product." (Emphasis added.) [Clerk's Transcript in *Coffee-Rich II*, p. 118.]

Similar findings were proposed by appellees as to the remaining products. [Clerk's Transcript in *Coffee-Rich II*, p. 119.]

The trial court ultimately found that each of appellants' products:[9]

> ". . . when ready to be consumed, taken as a whole, could be mistaken for a milk product, although *plaintiffs' products have distinctive differences from milk products in appearance, taste, odor, color or texture,* and each of said products is therefore subject to Chapter 1250." (Emphasis added.) (Appendix D, p. D-6.)

On the second appeal, *Coffee-Rich II* found that the finding with respect to such distinctive differences

[9]The trial court proceeded to make this determination under California law without taking additional evidence, having already taken voluminous evidence. The trial court simply applied the evidence in accordance with the rule laid down by *Coffee-Rich I* forbidding a consideration of comparisons. *Garden Grove etc. School District v. Meier,* 206 Cal. App. 2d 570, 574, 24 Cal. Rptr. 53 (1962); *In re C.D.H.,* 7 Cal. App. 3d 230, 86 Cal. Rptr. 565 (1970).



was "unauthorized and void" and that portion of the finding was considered as stricken notwithstanding that the finding was not based on the condemned comparison testing of *Coffee-Rich I.* (Appendix A, p. A-9.) The findings and judgment, with the deletion of all reference to and finding in respect to appearance, taste, etc, were affirmed.

Appellants do not here question whether comparison tests may or may not be proper as a matter of state law interpretation of Chapter 1250.[10] Appellants' objection is based on *Coffee-Rich II's* usurpation of the fact-finding function of the trial court.[11] *Coffee-Rich II's* judgment in effect declared that the case would be decided without the benefit of competent evidence as to whether appellants' products did or did not fulfill the statutory definition and without any finding in the record with respect to the essential first-half of the statutory definition of the regulated class.

This amounts to an arbitrary determination by a tribunal that a class is subject to special regulation without any actual finding that the product is within that class, contrary to essential fairness and the proce-

[10]In fact, *Coffee-Rich II* declares that comparison tests may be proper in part (App. A, p. A-12) although *Coffee-Rich I* rejected them and all of the evidence on the point in question presented was by no means done in the context of comparisons. The effect of this is discussed below, page 26.

[11]Neither *Coffee-Rich I* nor *Coffee-Rich II* ever had any of appellants' products placed before them and were thus not in a position to pass on the question assuming it would have been proper, which it would not. *In re Jost,* 117 Cal. App. 2d 379, 388, 256 P. 2d 71 (1953).

dural rules of the jurisdiction making that determination.

It has become virtually axiomatic that due process in respect of adjudication of rights requires an opportunity for a hearing at a meaningful time and in a meaningful manner. *Boddie v. Connecticut,* 401 U.S. 371, 378 (1971); *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

In the present case, appellants and the trial court proceeded with evidence which included (but was not limited to) the use of comparisons following procedure which had been used for years in every similar case without criticism.[12] And, although the California Attorney General raised objection to this procedure in the trial court, he was using comparisons himself in a concurrent proceeding involving the same statute and similar products.[13]

*Coffee-Rich I* held that the part the comparisons played in determining the organoleptic characteristics of appellants' products was erroneous and the slate was wiped clean insofar as the only finding in the case on this point was concerned. The case was remanded.

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[12]See, *e.g., United States v. Ninety-Five Barrels,* 265 U.S. 438, 443 (1924); *Midget Products, Inc. v. Jacobsen,* 140 Cal. App. 2d 517, 519, 295 P. 2d 542 (1956); *Coffee-Rich, Inc. v. Michigan Department of Agriculture,* 1 Mich. App. 225, 135 N.W. 2d 594, 595 (1965).

[13]*Tip Top Foods, Inc. v Lyng,* 28 Cal. App. 3d 533, 104 Cal. Rptr. 718 (1972). See Appendix F. The effect of this action is discussed below in subsequent points.



At this point, appellants were entitled to a meaningful hearing—one under the proper test so that the organoleptic characteristics of their products could be determined vis-a-vis milk products. As discussed above (page 14), both appellants and appellees submitted modified findings on this point, both seeking different factual determinations.

But when the case came back to the California Court of Appeal, *Coffee-Rich II* held that appellants (and, presumably appellees) were not entitled to have the trial court decide the question of appearance, taste, smell and the like. This left the case with no finding of fact either way. In so doing, *Coffee-Rich II* took from appellants the due process that the trial court sought to provide.

Appellants submit that these factors bring this case within the rule of *Saunders v. Shaw,* 244 U.S. 317 (1917), holding that where a case has been decided by a state appellate court in such a way that a party has not had a proper opportunity to present his evidence, he has been denied due process of law.

As the matter now stands, if appellants do not in all respects comply with Chapter 1250, they are subject to prosecution. In such a prosecution they will be foreclosed from ever presenting evidence with respect to lack of similarity between their products and milk products in appearance, taste, smell, texture or color because the question of applicability has previously been decided. And this without any evidence ever having

been permitted to be received and ultimately acted upon by a trier of fact.

California adheres to the basic rule that conclusions of law must be supported by ultimate facts, which in a case such as this are based on findings of fact.[14] This Court will investigate such a situation under the circumstances here presented. As held in *Great Northern Railway Co. v. Washington,* 300 U.S. 154, 165 (1937):

> "Passing the appellant's contentions that a federal right may not be denied under the guise of the application of a state rule of evidence, we come to the question whether, when the asserted right has been denied, this court is concluded by a finding of fact or a mixed finding of law and fact made by the state court. We have repeatedly held that in such case we must examine the evidence to ascertain whether it supports the decision against the claim of federal right."

The State of California must not be permitted to sweep appellants' products within the regulatory framework without a factual determination whether the products are covered by the California statute and without permitting appellants the opportunity to present evidence declared to be competent on the question.

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[14]*Hunter v Sparling,* 87 Cal. App. 2d 711, 721, 197 P. 2d 807 (1948); California Code of Civil Procedure Sections 632, 634.



**2. Officials of the State of California Have Caused Appellants to Be Denied Equal Protection by Reason of Their Calculated Unequal and Concurrent Assertion of the Application of Chapter 1250 Before Different Courts.**

When *Coffee-Rich I* and *Tip Top* (*supra,* p. 9) were tried there was no appellate (or prior trial court) interpretation of Chapter 1250. The California Attorney General was counsel for the state officers in both cases. As such, he had a duty to, and did, urge the construction considered proper by him with respect to the application of Chapter 1250 to products questioned as being subject to regulation thereunder.

As this Court noted with respect to the California Attorney General, in *Phyle v. Duffy,* 334 U.S. 431, 441 (1948):

> ". . . The attorney general is the highest nonjudicial legal officer of California, and is particularly charged with the duty of supervising administration of the criminal laws. His statement on this question is entitled to great weight in the absence of controlling state statutes and court decisions."

The appellees, therefore, through their counsel, had the obligation to interpret and apply Chapter 1250 in an evenhanded manner in seeking to persuade the California courts to interpret Chapter 1250 and to apply it to products similarly situated.

The issues in *Tip Top* were identical to those presented in *Coffee-Rich,* the only distinction being the products presented for adjudication. *Tip Top* involved two "all-purpose dressings" and a beverage used by institutions (28 Cal. App. 3d at 540, 104 Cal. Rptr. 722). In issue was the question of whether the *Tip*

*Top* products were "products resembling milk products" under Section 38912 (28 Cal. App. 3d at 551-52, 104 Cal. Rptr. 730-31), the identical issue as presented in this case.

The original finding in this respect, affirmed on appeal, was as follows:

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> "The textures, colors, odors and tastes of plaintiffs' products 'Pantry Pride', 'Sour C', and 'Hi-Lo' are not materially different from the corresponding characteristics of competing milk products, and each, taken as a whole, bears resemblance to a milk product, or could be mistaken for a milk product and is a product resembling a milk product within the meaning of §38912 of the Agricultural Code." (Appendix F, p. F-7.)

The extracts from the Reporter's Transcript in *Tip Top* (Appendix F, pp. F-14 to F-47) disclose that the evidence presented to determine whether the products in issue were "products resembling milk products" was of the same type offered by appellants herein, objected to by the appellees and, on the urging of appellees condemned by *Coffee-Rich I*. That evidence was based on comparisons. But in *Tip Top* the same defendants not only did not object, they participated in the use of comparisons and disclosed the fact that *the officials charged with enforcement of Chapter 1250 had used side by side comparison tests* to determine whether the products there in issue were or were not "products resembling milk products."



Examples of comparisons used in *Tip Top* are as follows:

1. Plaintiff examined the defendant Chief of the Bureau of Dairy Service concerning similarity of organoleptic characteristics between "Sour C" and sour cream. (Appendix F, pp. F-19 to F-25.) In so doing, samples of each were placed on baked potatoes and Mr. Van Buren (the Chief of the Bureau) was asked questions about them. The court was likewise requested to state for the record his observations about similarities and differences between the two products. (Appendix F, pp. F-21 to F-24.) Counsel for the defendant State officers participated in this questioning of the court. (Appendix F, pp. F-23 to F-24.) And the court tasted both products. (Appendix F, p. F-22.)

2. A similar colloquy, examination and tasting took place with respect to comparisons between "Pantry Pride" and milk. (Appendix F, pp. F-26 to F-27.)

3. Evidence of comparison tests made by an expert employed by plaintiff using "Sour C," "Hi-Lo" and sour cream dressings was received into evidence. (Appendix F, pp. F-31 to F-35.)

In no instance did the defendants, through their counsel, object to the use of such comparisons as was done in *Coffee-Rich*.

In addition, plaintiff's Exhibit 2 (Appendix F, p. F-48) was a summary of a side-by-side taste comparison test by officers of the California Department of Food and Agriculture "since the advent of 1250 to

determine whether or not [the products in question resemble] a dairy product." (Appendix F, p. F-14.) The officers testified at length on examination by both plaintiff and defendants as to how the comparison test was conducted and the results. (Appendix F, pp. F-14 to F-18, F-27 to F-35.)

As stated by this Court in *Cooper v. Aaron,* 358 U.S. 1, 16-17 (1958):

> "The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' [Citation.] Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, [Citations], or whatever the guise in which it is taken. [Citations]."

See also:

*Cochran v. Kansas,* 316 U.S. 255 (1942).



In the present case, the appellees, on behalf of the State of California took the position that comparisons were improper in spite of the use of the comparisons in another case with identical issues and in spite of the fact that the defendants themselves made use of comparisons in order to determine which products to assert were covered. The responsible State Officers and their counsel were the same persons, and the acts were being taken concurrently in the two cases. *Tip Top* was actually tried while *Coffee-Rich* was submitted, and the pre-trial *Tip Top* comparisons by the California State Officers took place prior to their *Coffee-Rich* objections to this procedure.

Thus, Tip Top Foods, Inc. has been allowed comparisons when appellants here have not. There is no rational legal basis for the distinction. In practice, the reason seems quite apparent: Comparisons established similarities in *Tip Top* whereas they established "distinctive differences" in this case. Thus, the State used comparisons or objected to them depending on which approach would lead to the result the State officers wanted to reach.

Appellants submit that this procedure denies appellants equal application of the law and thereby denies equal protection.[15] The appellees cannot have it both ways. Appellants submit that this denies appellants their fair and equal hearing and that the present judgment cannot stand.

*Stanley v. Illinois,* 405 U.S. 645 (1972).

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[15]This denial resulted in part from the fact that defendants did not disclose to plaintiffs herein or to the *Coffee-Rich* court that they had taken inconsistent positions in their application of the law.

### 3. Chapter 1250 as It Has Been Applied to Appellants Is so Vague and Indefinite That It Denies Appellants Due Process.

Appellants initially attacked Chapter 1250 on its face asserting that it was so vague and indefinite that men of common understanding could only guess at its meaning and that it was incapable of proper administration. (*Supra,* page 11.) Chapter 1250 has now been applied to appellants by the judgment of *Coffee-Rich II*. However, the record demonstrates that it cannot be ascertained *how* the definition was applied to appellants, and there is no basis for application of the statute under Section 38912 in the future.

Neither the officers of the State of California enjoined to enforce the Act, the California Attorney General nor the courts know what to do with the statutory definition (Section 38912). No one knows how to apply it. This is well illustrated by the following examples from the record:

1. At the beginning of this case, appellees and their counsel asserted that Section 38912 was clearly conjunctive in nature. (Supplemental Clerk's Transcript in *Coffee-Rich I,* p. 16, quoted above, pages 12-13.) Appellees continued this assertion through findings submitted to the trial judge. (Clerk's Transcript in *Coffee-Rich I,* pp. 445, 469.)

2. In the appeal in *Coffee-Rich I,* appellees asserted that Section 38912 contained a disjunctive definition. (Defts' Resp. Br. in *Coffee-Rich I,* pp. 3-4.)

3. Appellees objected to all comparisons at the trial of this action and in the appeal in *Coffee-Rich I.*



4. In the *Coffee-Rich II* appeal, appellees suggested that some sort of abstract comparison test was appropriate. (Defts' Resp. Br. p. 18.)

5. In *Tip Top Foods, Inc. v. Lyng,* 28 Cal. App. 3d 533 (1972), side-by-side comparison tests were used by the same defendants as in *Coffee-Rich* to determine whether the products in question were "products resembling milk products."

6. In *Tip Top,* the same defendant officers used alongside comparisons to decide what products to assert to be "products resembling milk products."

7. The trial court and *Coffee-Rich I* applied Chapter 1250 to hard-frozen "Coffee-Rich" at point of use to determine whether it was covered (27 Cal. App. 3d at 802, 104 Cal. Rptr. at 258; *cf.* n. 5, p. 802) but applied Chapter 1250 to sterilized products at point of sale to determine that they were exempt from Chapter 1250 under Section 38903, subdivision (e)[16] (27 Cal. App. 3d at 808, 104 Cal. Rptr. at 263) notwithstanding that at point of use (exposed to bacterial contamination) the two products are in all respects the same both chemically and in organoleptic characteristics. (Appendix D, pp. D-7, D-8, para. 21.)

8. The defendant officer primarily responsible for enforcement of the Act changed his position during the course of the *Coffee-Rich* trial concerning coverage as to a powdered product identical to one of appellants' products in issue in *Coffee-Rich* ("Coffee-mate") and did not know why he did it. [Reporter's Transcript, pp. 385-86, 1849-53, 1885, 1951-52.]

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[16]Subsequent to *Coffee-Rich I,* Section 38903 was amended and subdivision (e) became sbudivision (d). Stats. 1973, c. 341. The amendment did not affect the exemption under discussion.

9. *Coffee-Rich I* condemned comparisons without in any way suggesting they had some use. (27 Cal. App. 3d 801-02, 104 Cal. Rptr. at 258.)

10. *Coffee-Rich II* suggests that comparisons may have some place in deciding these cases. (Appendix A, p. A-12.)

Such uncertainty demonstrates that the Act is unconstitutionally vague and denies plaintiffs due process of law assured by the Fourteenth Amendment. *Connally v. General Construction Co.*, 269 U.S. 385 (1926).

In *Terry v. California State Board of Pharmacy*, 395 F. Supp. 94 (N.D. Cal. 1975), a three-judge District Court held a police-power statute regulating advertising to be unconstitutional. The defendant representatives of the State of California had, as they have done here, argued different meanings to the law at different times. In finding the law unconstitutionally vague the court said (395 F. Supp. at 107):

> ". . . The statutory language in combination with the defendants' inconsistent attempts to elucidate the scope of the statute render this legislation unconstitutionally vague."

Truthful informational labeling is an interest protected by the First Amendment made applicable to the States by the Due Process clause of the Fourteenth Amendment. *Bigelow v. Virginia*, .... U.S. ...., 44 L. Ed. 2d 600 (1975). The definitional approach of Chapter 1250 as applied by California courts has a chilling effect on this federally protected right. The vagueness must be construed and reviewed in this context.

Appellants submit that by reason of its application by the California courts Section 38912 is in far worse



shape than at the outset of this case. Even the two divisions of the California Court of Appeal (*Coffee-Rich I* and *Coffee-Rich II*) have demonstrated their unsureness of how the section should be applied. There is certainly no guide to either government or industry as to how to apply the test or at what stage to apply it, that is, whether at point of purchase or at point of consumption.

Appellants and other manufacturers are still faced, as they were in the beginning and during trial with an entirely subjective application which varies from person to person, from court to court and from time to time.

The definition is unconstitutionally vague, and this Court should so declare.

**Conclusion.**

If *Coffee-Rich II* is allowed to stand, the State of California will be in a position to subject a class of persons or products to regulation without allowing that class to present admissible evidence that it is outside the scope of the regulatory statute and without the adjudicatory body needing to determine whether the class in fact fits the statutory definition of the class intended to be regulated.

In this case, although the State of California has been unable to enunciate the definitional statute, the California Courts have been unable to apply it and appellants have been denied the right to offer admissible evidence under it, *Coffee-Rich II* has brought appellants' products into the regulatory scheme by an *ipse dixit* declaration that the products are covered.

This case should be considered by this Court and the judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

ELLIS ARNALL,
*Attorney for Appellants.*

*Of Counsel:*
ARNALL, GOLDEN & GREGORY,
EDWIN FRESTON,
LOUIS W. MYERS, II,
MARK A. SPRAIC, of
ARGUE, FRESTON & MYERS.

## APPENDIX A.

### Opinion of the Court of Appeal. ("Coffee-Rich II")

In the Court of Appeal of the State of California, Second Appellate District, Division One.

Coffee-Rich, Inc., a Delaware corporation, and Rich Products Corporation, a Delaware corporation, Plaintiffs, Respondents, and Appellants, v. Jerry W. Fielder (Appointed as Successor to Richard Lyng), as Director of Agriculture of the State of California; R. L. Van Buren, as Chief of the Bureau of Dairy Service of the Department of Agriculture of the State of California; L. H. Lockhart, as Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California, Defendants, Appellants, and Respondents. Civil No. 44921, (Sup.Ct.No. 943548).

Filed: June 9, 1975.

APPEALS from a judgment of the Superior Court of Los Angeles County. Samuel L. Kurland, Judge. Affirmed.

Evelle J. Younger, Attorney General, Carl Boronkay, Assistant Attorney General, Walter E. Wunderlich and E. Robert Wright, Deputy Attorneys General, for Defendants and Appellants.

Argue, Freston & Myers, Edwin Freston, Louis W. Myers, II; Arnall, Golden & Gregory, Ellis Arnall and Elliott H. Levitas for Plaintiffs and Appellants.

The case at bench reaches us after a decision by the superior court on remand from the Court of Appeal after reversal of a judgment reached at trial. It emphasizes two serious deficiencies in California appellate procedure. Substantively, the case illustrates the diffi-

culties flowing from an appellate court judgment reversing and remanding for "further proceedings consistent with this opinion" where the opinion itself is not specific on what is to be done. Procedurally, the case illustrates the deficiency inherent in the lack of a rule of court requiring that so far as feasible, the panel which gave the original opinion reversing a judgment hear the matter again on an appeal after retrial or remand. Because of the impact of the doctrine of law of the case, we cannot approach the case afresh but must act in a fashion construing the prior opinion and the meaning of the direction on remand. Recognizing a certain peril in that process, we affirm the judgment of the trial court reached after remand.

The case at bench began on November 22, 1968, with the filing of plaintiff's complaint for declaratory and injunctive relief. Plaintiffs sought a declaration that the 1968 enactment of sections 38901 through 38987 of the Food and Agriculture Code dealing with "products resembling milk products" were either inapplicable to their product "Coffee-Rich" in its various forms, or were unconstitutional as applied to that product. They prayed that the declaration be enforced by a permanent injunction restraining defendants Department of Agriculture and its representatives (Department) from enforcing the statutes against plaintiffs.

The statutory scheme regulates "products resembling milk products." Those are defined in Food and Agriculture Code section 38912 as "any food product for human consumption [with exceptions not here applicable], which has the appearance, taste, smell, texture or color of a milk product and which, taken as a whole, bears resemblance to a milk product, or could be mistaken for a milk product." Section 38904 of



the Food and Agriculture Code prohibits the use of products resembling milk products in any charitable or penal institution in California that receives state assistance. Sections 38922 and 38924 deal with standards for products resembling milk products. Sections 38931 through 38937 provide for state licensing of plants producing the products, and sections 38941 through 38946 for registration of manufacturers. Sections 38951 through 38958 deal with labeling. Section 38952 requires in part that the product "be labeled with a fanciful or brand name only," and that if it is the type of product produced by plaintiffs, the list of ingredients shall specify that it is a "nondairy product" or a "filled product." Section 38971 regulates advertising and displays. Other provisions of the statutory scheme deal with administration. Section 38905 of the Food and Agriculture Code provides that hotels, restaurants, lunch counters, and the like may not serve products resembling milk products to the public "unless there is displayed in a prominent place in each room where the meals are served, a sign which bears the words 'beverages and products which are not milk products are served here,' in blackfaced letters of not less than four inches in height upon a white background, or unless the words are printed on a menu which is furnished to such patrons, . . . in legible type, no smaller than that which is used to describe other food items on the menu, and upon the same portion of the menu where other food items are described."

Plaintiffs manufacture a nondairy coffee whitening agent which serves the same function as a milk product when added to beverages. The product is manufactured and sold, both in hard-frozen and powdered form. Plaintiffs also produce and sell in hard-frozen

form, sometimes in pressurized cans, a nondairy whipped or whippable topping for desserts and beverages. On extensive and conflicting evidence, the trial court made the following findings of fact: "16. When compared to and alongside of milk products, plaintiffs' products have distinctive differences in appearance, taste, odor, color, and texture. . . . 20. When plaintiffs' products are sold in the original labeled package (or, in the case of 'Coffee-Rich,' when in powdered form), the products do not bear resemblance to any milk product nor could they be mistaken for any milk product. 21. When plaintiffs' products are served to the consumer or are served or sold by institutions (other than in powdered form), not in labeled containers which identify the product as a non-dairy product, each of said products, taken as a whole, could be mistaken for milk products, and are subject to the Act."

The trial court invalidated portions of the statutory scheme as denials of due process, equal protection of law, and impediments to interstate commerce. It enjoined Department from enforcing the statutes declared unconstitutional and from applying the remainder of the scheme to plaintiffs' products found not to meet the definition of Food and Agriculture Code section 38912.

Both plaintiffs and Department appealed from the judgment. The resulting decision is reported in 27 Cal.App.3d 792 [104 Cal.Rptr. 252] (Coffee-Rich I). After a review of decisional law in related fields, the Court of Appeal concluded that the police power authorizes state regulation of products of the type produced by plaintiffs. It reversed in part the trial court's conclusion determining that findings 16 and 20 quoted



above are inconsistent with finding 21, also quoted, and that findings 16 and 20 employed a test not included within the statutory definition. The court said of finding 16: "It is logical to assume that the ordinary consumer, when comparing 'milk products' which are 'alongside' of resembling products, would be far less likely to be mistaken as to which was which than if the two types of products were not 'alongside.' . . . The assumption that every time a consumer is about to use a product resembling a milk product, there is provided for his inspection and/or use a milk product which he can see and simultaneously taste and smell . . . is one which is not warranted by any of the facts of record and substitutes a different test than that found in section 38912. Finding 16 is a far narrower test than that envisaged by the Legislature. A test so engrafted . . . must be disregarded." (27 Cal.App.3d at pp. 801-802.) The court stated further: "Finding 20 asserting that plaintiffs' products *when* packaged, '. . . do not bear resemblance to any milk product nor could they be mistaken . . .' means no more than what it specifically says. This finding says only that when the consumer sees the packaged product labeled 'non-milk product' he should not reasonably be mistaken that it is a 'milk product.' It is, however, not even equivalent to a finding that plaintiffs have complied with the labeling and advertising provisions of [the Act]. It is not a finding that the *contents* of the package are not embraced within the definition of section 38912 . . . ." (27 Cal.App.3d at p. 802.) The court in Coffee-Rich I continued, after drawing "all logical inferences in favor of" finding 21: "It would appear to us that the language used by the trial court 'could be mistaken for milk products' followed by the fortifying words 'and

are subject to the Act' leave no doubt that at least one, if not all of the five specifics are implicitly included in the finding [¶] . . . In addition, the record leaves no doubt as to the likelihood of public deception." (27 Cal.App.3d at p. 804.)

In summary, the Court of Appeal in Coffee-Rich I: (1) determined that findings 16 and 20 employed an improper test and were hence irrelevant to the extent that they focused upon immediate comparison by the consumer and upon the effect of labeling in determining confusion of product; (2) determined that finding 21 utilized a proper standard and was determinative; but (3) was silent on the consequences of the parenthetical phrase in finding 21 limiting its scope to Coffee-Rich in "other than powdered form" and language of like import in finding 20.

Turning to issues of pure law, the court held unconstitutional as not within the permissible exercise of the police power Food and Agriculture Code section 38904 prohibiting the use of products resembling milk products in charitable and penal institutions, and section 38905 requiring signs and menu notices in restaurants and the like. It determined that the licensing provisions of the statute were inapplicable to plaintiffs' out-of-state facilities. The Court of Appeal held the remainder of the statutory scheme constitutional against attacks on due process, equal protection, and interferences with interstate commerce grounds.

The Court of Appeal in Coffee-Rich I then concluded: "The judgment is reversed and remanded with directions to modify the findings of fact, conclusions of law and the judgment (permanent injunction) in terms consistent with this opinion." (27 Cal.App.3d at



p. 819.) The California Supreme Court denied hearing, and the United States Supreme Court denied a petition for certiorari.

On remand, the trial court entered a new finding of fact 14 stating: " 'Coffee-Rich' in hard-frozen form or said hard frozen product as thawed (but not powdered 'Coffee-Rich'), 'Rich's Whip Topping,' 'Sundi-Whip' and 'Spoon n' Serve,' each, when ready to be consumed, taken as a whole, could be mistaken for a milk product, although plaintiffs' products have distinctive differences from milk products in appearance, taste, odor, color or texture, and each of said products is therefore subject to [the Act]." It entered its judgment declaring that Coffee-Rich products in other than powdered form are subject to the statutory scheme, that sections 38904 and 38905 are unconstitutional and invalid, and that sections 38931 through 38937 cannot be constitutionally applied to require plaintiffs to obtain licenses for manufacturing plants located outside of California. The court declared the remaining portions of the statutory scheme valid. It enjoined enforcement by Department of the portions of the statute declared invalid.

Both plaintiffs and Department again appealed. Plaintiffs contend that new finding of fact 14 compels the conclusion that none of its products falls within the definition of section 38912, and renew the various constitutional attacks made by them upon the statutes in their original appeal. Department contends that the trial court erred in excluding powdered Coffee-Rich from the ambit of the statute, arguing that the contrary is established by the law of the case and plaintiffs' admissions in a petition for hearing. Department contends, also, that the trial court prejudicially

failed to find on issues with respect to plaintiffs' labeling practice and in giving injunctive relief. Department asks that this court make findings of fact on appeal. As we construe the opinion on Coffee-Rich I, the contentions of plaintiffs and Department must be rejected.

Plaintiffs' and Department's contrasting contentions on factual issues directly raise the matter of the consistency of the trial court's findings and judgment on remand with the opinion in Coffee-Rich I. In determining that issue, we are faced, as was the trial judge, with the need to interpret the first opinion unaided by knowledge of what was in the minds of the panel members when it was promulgated. Two questions are involved: (1) the propriety of the trial court action changing the import of what was previously in finding 16 of the first case by striking the comparison language so as to find unequivocally in new finding 14 that Coffee-Rich has distinctive differences from milk products in appearance, taste, color, or texture; and (2) the conclusion by the trial court on remand that the facts, as determined by it, establish that powdered Coffee-Rich does not meet the statutory definition of a product resembling a milk product.

As we read the opinion in Coffee-Rich I, the trial court lacked authority to change old finding 16 as it did in new finding 14. Where a reviewing court has remanded a matter to the trial court with directions ". . . the trial court . . . is bound to specifically carry out the instructions of the reviewing court . . . . [A]ny material variance from the explicit directions of the reviewing court is unauthorized and void." (*English v. Olympic Auditorium, Inc.*, 10 Cal.App.2d 196, 201-202 [52 P.2d 267]; see also *Hampton v. Superior Court*, 38 Cal.2d 652, 656 [242 P.2d 1].) Here the specific



direction of the remand in Coffee-Rich I was that the trial court modify its findings of fact. The remand contained no direction that the trial court make new findings, particularly no new finding inconsistent with old finding 21 approved by the reviewing court. The language of new finding of fact 14 of the distinctive differences between Coffee-Rich and milk products represents such a material change from old finding 16 as to constitute a new finding inconsistent with the scope of the trial court's jurisdiction on remand. It is hence "unauthorized and void."

No prejudice, however, flows from the unauthorized finding of fact because its consequence is not carried into the judgment. Despite the change, the trial court determined that Coffee-Rich other than in powdered form is covered by the statutory definition of a product resembling a milk product. When new finding 14 is read in a fashion which strikes the improper addition (Code Civ. Proc., § 909), what remains is the essential content of finding 21 at the first trial which brought Coffee-Rich, other than in powdered form, within the statutory scheme. That holding, which is the law of the case, compels the conclusion that the trial court judgment dealing with Coffee-Rich products, in other than powdered form, is correct.

Department's contention that the opinion in Coffee-Rich I compels the conclusion that powdered Coffee-Rich also meets the definition of a product resembling a milk product is without merit, although for a different reason. The opinion in Coffee-Rich I mentions but does not discuss powdered Coffee-Rich despite findings 20 and 21's clear exclusion of that product from the factual classification of products that can be mistaken for milk products as defined in section 38912. The

opinion, however, approves original finding 21 and utilizes the finding as the basis of its conclusion. The Court of Appeal opinion in Coffee-Rich I cannot be construed as a determination that the particular form of product was, as a matter of law, included within the statutory definition since the application of the definition was excluded by an approved finding of fact. Department seeks to avoid the otherwise compelled result by arguing that in their petition for hearing before the California Supreme Court in Coffee-Rich I, plaintiffs admitted that powdered Coffee-Rich fell within the definition of section 38912. Assuming that plaintiffs did admit the fact in their petition, the admission is not binding here. The rule that an admission in brief may be treated as dispositive (see 6 Witkin, Cal. Procedure (2d ed.), Appeal, § 428) applies only where the admission was made in the context of a prior and final case (*Estate of Stevens*, 27 Cal.2d 108, 115 [162 P.2d 918]), or where it represents an express concession in the instant phase of the case (*Williams v. Superior Court*, 226 Cal.App.2d 666, 674 [38 Cal.Rptr. 291]). Neither of those conditions is present here.

Department's contention that the trial court erred in entering a judgment on remand including injunctive relief does not question the legal basis for the injunction or seriously argue that the directions of the Court of Appeal in Coffee-Rich I do not permit the relief.[1] Rather, defendants claim that an injunction is not necessary because Department will follow the declaratory judgment. A party who may suffer irreparable

[1]The original opinion has a heading "Findings Do Not Warrant An Injunction." The discussion which follows, however, deals with the appropriate scope of injunctive relief in light of the attack upon the trial court's findings of fact and conclusions drawn from them.



harm from enforcement of an unconstitutional statute may be granted injunctive relief against enforcement. (*Crittenden v. Superior Court*, 61 Cal.2d 565, 568 [39 Cal.Rptr. 380, 393 P.2d 692].) Here the evidence at trial supports the conclusion that Department threatened to enforce the statutory scheme in an unconstitutional manner and that enforcement in that fashion would irreparably harm plaintiffs. Department's statements in its brief that it will be bound by judicial decision cannot change the situation that was initially before the trial court. (*Pacific Gas & Elec. Co. v. Minnette*, 115 Cal.App.2d 698, 709 [252 P.2d 642].)

The other contentions of plaintiffs seek a redetermination of issues of fact and law which were before the Court of Appeal in Coffee-Rich I, or ask that we determine issues not before the trial court. That action is precluded.

"[W]here, upon an appeal, the supreme court [or court of appeal], in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal. . . ." (*Tally v. Ganahl*, 151 Cal. 418, 421 [90 P. 1049], quoted in *People v. Shuey*, 13 Cal.3d 835, 841 [120 Cal.Rptr. 83, 533 P.2d 21].) While the principle of law of the case will not be applied if to do so will result in an unjust decision, "more must be shown than that a court on a subsequent appeal disagrees with a prior appellate determinaton" to avoid the rule. (*People v. Shuey, supra*, 13 Cal.3d 835, 846.)

Here plaintiffs again assert the constitutional attacks on the statutory scheme that were pressed by them at trial and on the first appeal. The law of the case pre-

cludes that attack unless the application of the rule will result in "injustice." Plaintiffs seek to bring themselves within the restricted meaning of "injustice" in the context here used by arguing that in a different case involving different parties tried after the case at bench, the side-by-side "comparison test" of the nondairy product to milk products was employed and that the method was approved on appeal in *Tip Top Foods, Inc. v. Lyng,* 28 Cal.App.3d 533 [104 Cal.Rptr. 718]. Plaintiffs extend their argument, contending that the proceedings in *Tip Top Foods* demonstrate a denial of equal protection of the law in a fashion not considered in Coffee Rich I.

Both prongs of plaintiffs' argument fail. The reference to comparison in Coffee Rich I is directed solely to finding of fact 16 as discussed in the first appeal. There, the Court of Appeal holds that "distinctive differences" between milk products and nondairy products are to be determined generally and not solely in the context of a side-by-side comparison. It is silent on whether side-by-side analysis by experts or others is of evidentiary value in determining whether, when the non-milk product is viewed alone, it possesses "distinctive differences." In a given context, the side-by-side analysis may or may not be relevant to the ultimate statutory tests. If a trial court in *Tip Top Foods* admitted irrelevant evidence, that fact falls short of establishing that adherence to law of the case here will result in injustice. Similarly, since the opinion in *Tip Top Foods* makes no reference to the "comparison test" as the standard for determining "distinctive differences," it does not represent a change in the law relieving the case at bench from the strictures of the rule of law of the case.



In its opinion in Coffee-Rich I, the Court of Appeal dealt with a conclusion of the trial court that the labeling requirements of the act are unconstitutional in part because they conflict with a preempting federal statute. Section 38952 of the act requires that labels show only a fanciful or brand name of the product and whether it is a "nondairy" or a "filled product." 21 United States Code, section 343 (i) requires that products of the nature of Coffee-Rich be labeled "with the common or usual name of the food." The Coffee-Rich I court resolved the dilemma by stating that the common name for a product resembling a milk product is "nondairy product," "filled product," or the fanciful/brand name. It thus concluded that there was no conflict in the state and federal statutes. On remand, Department requested a finding of fact that none of plaintiffs' products has a common or usual name other than "the statutory generic name of 'nondairy products.'" The trial court refused the finding. That refusal is asserted by the Department to be prejudicially erroneous.

The trial court properly refused Department's proposed finding. It is unnecessary to determination of the cause at bench because the trial court on remand properly concluded that there was no conflict between state and federal law at the time of the initial trial. Moreover, the finding if made would exacerbate the problems of law of the case which plague this opinion. Common names identifying classes of products change with more than deliberate speed in this advertising-oriented era. A finding that could be construed as forever barring plaintiffs from asserting the effect of changed public conception of the common name for their products would work an unnecessary hardship.

We thus conclude on the merits that the action of the trial court must be affirmed. We emphasize, however, that the conclusion does not come easily in view of the nature of the remanding language in Coffee-Rich I and the happenstance of assignment of the subsequent appeal to a panel other than that which used the language in the first place. The case at bench illustrates the need for consideration of: (1) a standard of judicial administration precluding "remand for proceedings consistent with this opinion" unless the opinion on appeal specifically states what the trial court is to do; and (2) a rule of court requiring that an appeal from a judgment rendered after remand from the Court of Appeal be heard, so far as feasible, by the panel which determined the first appeal and remanded the case. In combination, the standard and rule will permit the already strained resources of this court to be better spent.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

Thompson, *J.*

We concur:

Lillie, *Acting P. J.*

Hanson, *J.*

Petition for Rehearing Denied July 3, 1975.

## APPENDIX B.

### Opinion of the Court of Appeal. ("Coffee-Rich I")

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Coffee-Rich, Inc., a Delaware corporation, and Rich Products Corporation, a Delaware corporation, Plaintiffs, Respondents and Appellants, vs. Jerry W. Fielder, (appointed as Successor to Richard Lyng), as Director of Agriculture of the State of California, R. L. Van Buren, as Chief of the Bureau of Dairy Service of the Department of Agriculture of the State of California, L. H. Lockhart, as Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California, Defendants, Appellants and Respondents. Civil No. 38748. S.Ct. No. 943548.

Filed: Sept. 19, 1972.

Appeals from judgment of the Superior Court of Los Angeles County. Samuel L. Kurland, Judge. Reversed with directions.

For Appellants and Respondents State of California: Evelle J. Younger, Attorney General; Sanford N. Gruskin, Assistant Attorney General; Walter E. Wunderlich, Jeffrey C. Freedman, Deputy Attorneys General.

For Appellants and Respondents Coffee-Rich, Inc.: Flint & Mac Kay, Edwin Freston, Louis W. Myers, II. Of Counsel: Ellis Arnall and Elliott H. Levitas, of Arnall, Golden & Gregory.

For Amici Curiae: Murphy, Murphy, Black & Williams, Frank Murphy, Jr. and John C. Hamilton.

Plaintiffs Coffee-Rich, Inc. and Rich Products, separate Delaware corporations with their respective principal places of business in Buffalo, New York, seek a

judgment against various officials of the State Department of Agriculture, herein sometimes referred to as defendants or Department, declaring that certain amendments to the Agricultural Code effected by Chapter 1250 of Statutes and Amendments (1968) either have no application to the sale in California of their products or that the amending legislation is unconstitutional.[1] Plaintiffs' products, Coffee-Rich and three types of whipped topping, including "Spoon n' Serve" and "Rich's Whip Topping", collectively "Rich Toppings", are used as additives to beverages and solid foods, have been sold in California since 1960 and, in the case of Rich Toppings, with substantial changes in composition, since 1945. In a two and a half year period commencing in 1967, the most popular of the three toppings enjoyed sales in California in excess of one million dollars, and Coffee-Rich for the same period had sales approximating $600,000.

The trial resulted in a permanent injunction restraining defendants in substantial part, although not completely, from "* * * enforcing the provisions of Statutes 1968, Chapter 1250, with respect to the manufacture, importation, handling, distribution, sale or use * * *" in California of plaintiffs' named products.[2]

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[1]Chapter 1250, enacted as sections 38901-38987 of the Agricultural Code, brought important changes in Chapter 6 of Division 15 of the Code. (See Op.Leg. Counsel, 1968 A.J. 4996.) The amended Chapter 6 is entitled "Products Resembling Milk Products" in lieu of "Imitation Milk Products" and contains a comprehensive scheme of regulation of products "resembling milk products." Section 32512 defines "Milk Products" in great detail.

[2]The statutes under challenge, added by Chapter 1250 of Calif. Stats. 1968, will be collectively referred to as Chapter 6, which is the chapter in the Agricultural Code regulating products resembling milk products, enacted by Chapter 1250. (See footnote 1, *supra*.) All references in the text are to the sections of the Agricultural Code, unless otherwise noted.



Plaintiffs appeal from several specific orders of the trial court interpreting and applying certain sections of Chapter 6 but only to the extent that some of these interpretations are unfavorable to plaintiffs, and from finding (21) that the products, when not in containers, could be mistaken for milk products.

Defendants, dissatisfied with the court's interpretation of certain sections of the Agricultural Code, appeal from portions of the judgment (discussed *infra*) as well as from the finding (20) and resulting decree that when the products are packaged, they cannot be mistaken for milk products.

Amici curiae, the Dairymen's Task Force, and the Consumer's Cooperative of Berkeley, Inc., have filed a brief supportive of defendants' position on some of the various issues at bench.

A detailed description of plaintiffs' products is set forth in footnote 3. As the parties correctly point out

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[3]The trial court made the following findings:

"6. Coffee-Rich is manufactured by Coffee-Rich, Inc., which is the owner of the trademark and trade name of "Coffee-Rich." Coffe-Rich, Inc. manufactures Coffee-Rich in the State of New York and sells it in interstate commerce to wholesale food distributors in California, and in the case of certain of the large grocery chains, Coffee-Rich is sold directly to the retailers in California. The wholesale distributors in turn sell Coffee-Rich to institutions such as restaurants, hospitals, schools and vending machine operators and to retail outlets.

"Coffee-Rich is sold only in hard-frozen form, except for some Coffee-Rich which is sold to institutions in powdered form. Coffee-Rich is sold by retail stores only in hard-frozen form.

"7. Coffee-Rich is a non-dairy coffee whitening agent which serves the same functions that are served by milk products and other food products as an additive to coffee, tea or other hot beverages to whiten and cool them, and also to be used on cereals and fruit and in cooking, and is so advertised by plaintiff, Coffee-Rich, Inc.

(This footnote is continued on next page)

the right to supervise the disposition of plaintiffs' products in this State must rest on section 38912 of Chapter 6 which reads: "Products resembling milk products means any food product for human consumption, except those referred to in section 38903, which has the appearance, taste, smell, texture or color of a milk product and which, taken as a whole, bears resemblance to a milk product, or could be mistaken for a milk product."

Chapter 6, predicated as it is on section 38912, constitutes an exercise of police power.

Emphatic approval of the exercise by a State of this power to regulate specifically milk products and re-

"8. Rich Products Corporation is the owner of the trademarks and trade names "Rich's Whip Topping," "Spoon n' Serve" and "Sundi-Whip" (hereinafter referred to as Rich Toppings) and of the United States Letters Patent under which the products are manufactured. Coffee-Rich is a developmental outgrowth of the subject of these patents. Rich Products Corporation manufactures the Rich Toppings named above in the State of New York and sells them in interstate commerce to wholesale food distributors in California. Wholesale distributors in turn sell Rich Toppings to retail outlets and to institutions such as restaurants, hospitals, schools, prisons, vending machine operators, etc. In the case of certain of the large grocery chains, the Rich Toppings are sold directly to the retailers in California. Rich Toppings are sold in frozen form.

"9. Rich's Whip Topping is a hard-frozen manufactured vegetable whipping emulsion which is sold to the public at retail in aerosol or pressurized cans. The topping, after thawing, is emitted in aerated form for use as a whipping topping and filler for pies, cakes, puddings, desserts, beverages and other foods. Rich's Whip Topping is also sold for institutional use in non-pressurized containers which, after thawing, is mechanically beaten or whipped into a topping for such foods. Sundi-Whip is the same product as Rich's Whip Topping and is sold by Rich Products Corporation to the institutional trade. Spoon n' Serve is a frozen pre-aerated vegetable whipped topping from the container onto the food or beverage. Spoon n' Serve is a non-dairy topping for pies, cakes, puddings, desserts, beverages, and other foods. It is also used as a filler for pies, cakes, puddings, desserts and other foods."



sembling products was announced 78 years ago by the Supreme Court of the United States:

"If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not be be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products." (*Plumley v. Massachusetts,* 155 U.S. 461, 472.) See *Florida Avocado Growers v. Paul,* 373 U.S. 132, 143-46, (California regulations affecting imported avocados upheld).

Regulation of a food product "which resembles milk" was held to be a proper exercise of such power by our Supreme Court. (*In re Reineger,* 184 Cal. 97.) The court said at page 104: "The proposition that a compound of this kind which is not milk, but which resembles milk, and which for many purposes may be used as a substitute for milk, is subject to reasonable regulations under the police power, designed to prevent it from being sold to consumers as real milk, is settled by the decision of the Supreme Court of the United States in *Hebe Co. v. Shaw,* 248 U.S. 297 * * *." The findings listed in footnote 3 (*supra*) leave no doubt that plaintiffs' products are "for many purposes * * * used as a substitute for milk."

Such resembling products are not merely subject to appropriate intra-state regulation. They may be prohibited from interstate commerce (*U.S. v. Carolene Products Co.,* 304 U.S. 144, 148), even when, in terms of nutrition, such products are at least as good as the milk product they resemble. (*Carolene Products Co. v. United States,* 323 U.S. 18, 21-25; see also *Sage*

*Stores Co. v. Kansas,* 323 U.S. 32, 34-36.) Several recent decisions, although there is authority to the contrary, have upheld state statutes which prohibited rather than regulated products resembling milk products. (*Quality Food Products, Inc. v. Beard,* 286 F. Supp. 351, 353-55, 359-62 (M.D.Ala.N.D. 1968) (prohibition of product which manufacturer intended to label 'imitation milk'); *Martin v. Wholesome Dairy, Inc.,* 437 S.W.2d 586, 601-02; (prohibition of filled products in 'imitation or semblance' of a dairy product); *Reesman v. State,* 445 P.2d 1004, 1008-10.)

The California Legislature specifically declares in Chapter 6 (section 38902) that its intent in enacting the legislation at bench was in the interest of public health, welfare and safety and the protection of the consumer from false and misleading marketing of products resembling milk products. It finds in section 38902 (a) that there is an increasing advent into the marketplace of food products resembling milk products which are frequently mistaken for milk products, which have the same uses as milk products, and which are "frequently" manufactured and marketed in the same manner and the same places as milk products. The trial court's findings affirm these declarations of fact by the Legislature.

Aside from a plea of res judicata, plaintiffs' specific legal attack on the the judgment insofar as it is unfavorable to them is in two parts. The first is predicated on the argument that the findings of the trial court entitle them to a complete injunction against defendants and the second, if the first fails, is that certain sections of Chapter 6 which affect the marketing of plaintiffs' products, are unconstitutional.



## FINDINGS DO NOT WARRANT AN INJUNCTION

Plaintiffs argue that findings 16 and 20 entitle them to a complete injunction. They point out that the trial court in its finding 16 held "When compared to and alongside of milk products, plaintiffs' products have distinctive differences in appearance, taste, odor, color and texture." And in its finding 20 it held that "when plaintiffs' products are sold in the original labeled package (or, in the case of 'Coffee-Rich', when in powdered form), the products do not bear resemblance to any milk product nor could they be mistaken for any milk product." Predicated upon findings 16 and 20, they argue that these pertinent findings should compel a judgment excluding their products from regulations under Chapter 6.

Finding 21, however, recites as fact that "When plaintiffs' products are served to the consumer * * * not in labeled containers which identify the product as a non-dairy product, each of said products, taken as a whole, *could be mistaken for milk products, and are subject to the Act.*" (Emphasis added.)

We proceed to an analysis of the findings in question.

At the outset, it must be noted that we treat, as do plaintiffs, 16 and 20 as findings of fact. Because finding 21 uses statutory language to state the ultimate facts found, plaintiffs insist that finding 21 is actually a conclusion of law. A finding of ultimate facts in the words of the statute is sufficient. (*So. Cal. Jockey Club v. Cal. etc. Racing Board,* 36 Cal.2d 167, 177-78; *Lumberman's Mut. Cas. Co. v. Ind. Acc. Com.,* 29 Cal.2d 492, 498, and cases cited therein; *Goss v. Fanoe,* 114 Cal.App.2d 819, 823.) Findings 16, 20 and

21 all use statutory language. Obviously, plaintiffs cannot have it both ways. We treat all three as findings of fact (text *infra.*)

Findings 16 and 20 do not satisfy section 38912 which all litigants concede to be the key statute and they are inconsistent with finding 21.

Section 38912 does not say that the *test* of "* * * resembling milk products" is to be made "* * * alongside of milk products * * *."

It is logical to assume that the ordinary consumer, when comparing "milk products" which are "alongside" of resembling products, would be far less likely to be mistaken as to which was which than if the two types of products were not "alongside". The Legislature, when it enacted Chapter 6 and specifically Section 38912, did not intend to subject the public to a shell game. The assumption that each time a consumer is about to use a product resembling a milk product, there is provided for his inspection and/or use a milk product which he can see and simultaneously taste and smell, is contrary to all business practice and is one which is not warranted by any of the facts of record and substitutes a different test than that found in section 38912. Finding 16 is a far narrower test than that envisaged by the Legislature. A test so engrafted upon and not warranted by Chapter 6 is outside the issues and must be disregarded. (*Crescent Lumber Co. v. Larson*, 166 Cal. 168, 171.) The engrafted test is in direct conflict with finding 21 that the consumer could mistake plaintiffs' products for milk products, when served to him in a non-labeled container. A conflict between material findings, taken alone, mandates a reversal of the judgment. (*Leonard v. Castle*, 78 Cal. 454, 460; *Stiefel v. McKee*, 1 Cal.App.3d 263, 266.)



Finding 20 asserting that plaintiffs' products *when* packaged, "* * * do not bear resemblance to any milk product nor could they be mistaken * * *" means no more than what it specifically says. This finding says only that when the consumer sees the packaged product labeled "non-milk product" he should not reasonably be mistaken that it is a "milk product." It is, however, not even equivalent to a finding that plaintiffs have complied with the labeling and advertising provisions of Chapter 6.[4] It is not a finding that the *contents* of the package are not embraced within the definition of section 38912, to wit: a product resembling milk, and the language of the section does not warrant such a construction.

The net effect of findings 16, 20 and 21 is that if a consumer were served with one of plaintiffs' products alongside a milk product, he could tell the difference; if sold in a packaged form, the consumer should not be deceived, but if served unpackaged, the consumer could be deceived and mistake plaintiffs' products for milk products.[5] However, Chapter 6, to borrow a phrase, makes it "perfectly clear" that the Legislature did not intend to abdicate its power to police the content of a product "resembling milk", or its power to reasonably

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[4]See footnote 15, *infra.*

[5]The verbose and complex record in this case contains a clue to the misconception of the scope and sweep of Chapter 6. The Chief of the Bureau of Dairy Service of the Department of Agriculture, one of the named defendants, when called as an adverse witness by plaintiffs, testified that from the point of view of enforcing Chapter 6 the "primary consideration" in the sale of resembling products was the *place of sale*, namely restaurant or grocery store. In a place such as a restaurant, the witness emphasized, the sale is made without benefit of packaging, and is served in an unlabeled container to the patron. In a grocery store, the consumer may read the labeling on the package and be informed accordingly.

provide what the label on the package should tell the public, merely because it is sold in a package which identifies it as a non-milk product.

Counsel at trial admitted that in a "restaurant context" the consumer could justifiably be confused as between milk products and Coffee-Rich which, when sold in a restaurant, is in appearance, etc. the same Coffee-Rich which is sold in packages.[6] Plaintiffs' explanation of this obvious breach of 38912 was that while the consumer could be confused in such a context, he was not deceived since the "public doesn't really care as long as this type of product is satisfactory for the specific need or use to which they are putting them." Very extensive opinion researches were introduced at trial to buttress this claim. We accept the opinion researches but such acceptance does not divorce plaintiffs from regulation under the State's police power and the trial court found it did not (finding 21). Counsel, of course, was focusing on the phrase of section 38902(b) which states that the Legislature

[6]"MR. LEVITAS [plaintiffs' counsel]: * * * there are some patrons who use a creamer in their coffee who think they are receiving cream when, in fact, they are receiving a nondairy product.

"There are some who think they are receiving cream when they are receiving either milk, half-and-half, evaporated milk, condensed milk, or some combination of them.

"There are people who believe they are receiving a nondairy product when in fact they are receiving either cream or half-and-half or condensed milk or some combination.

"* * *.

"We would go that far in saying that we believe that people are getting things for use in their coffee in restaurants which is different from what they think they are getting.

"Now, that is our stipulation. Our contention is, your Honor, that there is a great degree of confusion as far as this matter is concerned, but that basically the public doesn't really care as long as this type of product is satisfactory for the specific need or use to which they are putting them."



intended to prevent "deception *and* confusion." Aside from the fact that one may or may not care about being deceived, and still be deceived, it is clear that the Janus-like findings at bench are not supported by the record and were inspired by the mistaken approaches of counsel and the emphatic views of witnesses. Thus, to decree that the packaged product is not subject to regulation inverts the statutory pyramid by effectively allowing any substance, pure or impure, healthful or not, to be marketed, as long as it was in a "properly" labeled and an [sic] honestly[7] advertised in a container.

The fallacy of such a conclusion appears when it is applied by analogy to genuine milk products, and milk itself: it can hardly be contended that regulation of milk should be confined to its container, and that any sub-standard milk could be sold, as long as it was in a proper container. Our Supreme Court concluded over half a century ago that products *resembling* milk are subject to a reasonable regulation under the police power (*In re Reineger*, 184 Cal. 94, 104) and it is clear that any such regulation would be utterly self-defeating if it ignores the contents of the package.

[7]Packaging of milk and milk products is but one of the numerous standards and requirements for their production, processing and sale, set forth in Division 15 of the Agricultural Code. (See footnote 11, *infra*.)

The labeling on plaintiffs' packaging denotes that it contains no "milk fat". However, there is a complete omission of any mention that it does contain fat inherent in coconut oil. Such omission can, to use but one illustration, undoubtedly mislead a calorie conscious consumer. (See finding 32 and Regulation 471(b) *infra*.)

Also, Article 3 of Chapter 6 establishes the standards for an imitation milk product with great specificity as to chemical and physical composition (section 38912), its nature as a trade product (section 38922), purity standards (section 38923) and levels of healthfulness (section 38924). These sections would be futile legislation if mere compliance with sections on labeling and advertising would suffice to eliminate all other supervision.

Plaintiffs argue further that sales of their products to institutions (such as restaurants) and service thereof by institutions cannot be enjoined because finding 21 is defective in that it recites only that plaintiffs' products "* * * taken as a whole, could be mistaken for milk products, and are subject to the Act." Finding 21, plaintiffs argue, is defective because section 38912 mandates a finding of the conjunctive requirements: that the resembling product has "the appearance, taste, smell, texture or color of a milk product *and* which, taken as a whole, bears resemblance to a milk product, or could be mistaken for a milk product."

However, it is difficult to understand how a consumer could mistake a resembling product for a milk product if it did not have one or more of the five specifics outlined in section 38912. It would appear to us that the language used by the trial court "could be mistaken for milk products" followed by the fortifying words "and are subject to the Act" leave no doubt that at least one, if not all of the five specifics are implicitly included in the finding.

The findings and conclusions made impel this construction.

In addition, the record leaves no doubt as to the likelihood of public deception. (See footnote 6, *supra.*) And finally, under familiar appellate rules, this court is bound to construe findings and the judgment predicated thereon with all logical inferences in favor of such findings if their language and the record permits. (*Denham v. Superior Court*, 2 Cal.3d 557, 564; *Johnston v. Southern Pac. Co.*, 150 Cal. 535, 537.)



## RES JUDICATA

Plaintiffs assert res judicata binds this court to the result reached in *Aeration Processes, Inc. v. Jacobson*, 184 Cal.App.2d 836, respecting one of the four products which are subject to the litigation at bench, namely "Rich's Whip Topping." (It was Rich's Whip Topping which registered sales in excess of one million in a two and half year period.) In *Aeration* plaintiff-manufacturers of a product called "Instant-whip Topping" invoked, as do plaintiffs at bench, Los Angeles Superior Court cases No. 521006 and 597020 (*B.C. Whelan v. A.A. Brock, Director of Agriculture* and *Rich Products of California, Inc. v. A.A. Brock, Director of Agriculture*, respectively) and *Midget Products, Inc. v. Jacobson*, 140 Cal.App.2d 517, in an effort to show that the issue of "imitation milk products" had been finally adjudicated in these earlier cases, and that renewed consideration was therefore barred. The *Aeration-Whelan-Rich-Midget* line of decisions held that the products were not "imitation cream" or "imitation milk products" as those terms were defined in the then relevant sections of the Agricultural Code. Plaintiffs contend that "Rich's Whip Topping" is identical to the products which were the subjects of the four cited cases.

Recognizing that the definition of "imitation milk" of the now-defunct section 651[8] of the Agricultural Code cannot be determinative of an appeal to be disposed of in terms of section 38912 of the present Code, plaintiffs contend that the definition actually applied

[8]Section 651 defined an "imitation milk product" as any substance mixture or compound other than milk or milk products, intended for human food, made in imitation of, or having the appearance or semblance of, milk or any product thereof.

in *Aeration* is in substance indistinguishable from that of section 38912. The court did hold in that case that "imitation"[9] was a matter decided by taste, smell, texture, consistency, melting points and use, and the composite effect of all of them. (184 Cal.App.2d at 840-41). At bench, however, the trial court expressly found that "Rich's Whip Topping," sold under that name at the time of the Whelan and Rich Superior Court cases (1946-7 and 1953, respectively), differed from the "Rich's Whip Topping" in this case both in ingredients and color.

Assuming arguendo that the *Aeration* definition and section 38912 are identical, the change in ingredients is such a change in facts as will prevent the application of the doctrine of res judicata. (*McGaffey v. Sudowitz*, 189 Cal.App.2d 215, 218.)

Aside from the vital and substantial differences in fact and in statute between the *Aeration* line of cases and those at bench, it is worth noting that notwithstanding these decisive distinctions, the court in *Aeration* anticipated the difference between the statute then under construction (section 651), and the concept now contained in section 38912. In *Aeration*, although the court recognized that Rich's Whip Topping *resembled* a milk product, it held that the statute then in effect, to wit: 651, was predicated upon *imitation*, and went on to say that "* * * semblance or appearance * * * are not sufficient * * * to constitute imitation." Section 38912 obviously does and was intended to enlarge the definition of the *Aeration* decision dealing with "imitation milk". The declarations of several legislators contained in the record demonstrate that

[9]See footnote 10, *infra*.



this change in definition was not inadvertent and that section 38912 was drafted to *avoid* the definitional holdings of *Aeration* and *Midget*. In sum, *both* the law and the facts have changed. Under such circumstances, res judicata does not apply. (*Bernhard v. Bank of America*, 19 Cal.2d 807, 813.)[10]

## THE CONSTITUTIONALITY OF CHAPTER 6

Plaintiffs question the constitutionality of sections 38903(e), 38904, 35191, 38941, 38952, 38954, 38956, 61390, 38905 and section 471(b) of the Department's regulations.

The attack on each section, justified in some instances, will be generally treated in the order outlined above.

It should be made clear at the outset that the record indicates that plaintiffs' products, as they have been and are now constituted, are nutritious and wholesome and are in all particulars fit and acceptable for human consumption. Certainly the same can be said for milk and milk products.

The general and underlying thrust of plaintiffs' attack on the entirety of Chapter 6 is that it has been enacted in the interests of California's dairy industry and to protect it from competition. They point to the

[10]Section 651 spoke of an "imitation milk product" as one made "in imitation of" *or* "having the appearance or semblance of" a milk product. (Footnote 8, *supra*.) As noted in the text, the *Aeration* decision rejected, perhaps incorrectly, the alternative wording indicated and dismissed "mere" semblance or appearance as insufficient to bring the product within section 651. *Aeration* is sound to the extent that it holds "semblance" or resemblance to be a wider concept than imitation. (See *Coffee-Rich, Inc. v. Commissioner of Public Health*, 204 N.E.2d 281, 285.) The correctness of the holding therein exempting the product discussed from the now-superseded section 651 is not before this court.

lower cost of their products and to the general nutritional advantages of their products over milk. It should be therefore made clear at the outset that the State's Agricultural Code does not focus upon or single out specifically plaintiffs' products. All milk, milk products and products "resembling milk" products, produced and marketed in this State are governed by numerous, detailed and rigorous statutes and regulations in respect of every fact of production and marketing.[11] Nothing in the language of the Agricultural Code or specifically Chapter 6 is directed against out-of-state competition or for that matter to any particular in-state manufacturer of resembling products. Insofar as Chapter 6 may be constitutionally unfair to plaintiffs' products, and in some particulars it is (discussion *infra*), it is also constitutionally unfair to in-state products resembling milk. Considerations of a social or economic nature which may or may not underlie the legislation at bench are not within the province of this court to determine

[11]The Milk and Milk Products Act of 1947, contained in Division 15 of the Agricultural Code, is set forth in sections 32501-39524 of that Code. A mere glance at some of the section headings indicates the detailed nature of the statutes: Chapter 9 of Part 1 ("Weighing, Measuring, and Testing of Milk and Basis for Payment") extends *inter alia* to "Milk Fat Tests," "Nonfat Milk Solid Tests," and "Equipment;" the following Chapter on Containers sets forth regulations on "Brand Registration," "Branded Containers," "Containers for Particular Products," "Sanitation," and the like; Chapter 2 of Part 2 details in *15 separate Articles* standards for market milk and cream, regulating the precise bacterial count for the several types of milk, the required temperatures and other physical characteristics, the health standards of the producing livestock and the handlers of the milk, to name a few items. The Attorney General has attempted to highlight some of these regulations by listing some of the sections of the Milk and Milk Products Act of 1947, and that highly selective list extends to six pages in the Respondent's Brief. It is indeed impractical to condense several hundred pages of statutory, and the hundreds of pages of administrative, regulations with which the California milk producer has learned to live.



or, following the extensive legislative action in this area, to *re*determine. (*Bodinson Mfg. Co. v. Calif. Emp. Com.*, 17 Cal.2d 321, 325; *Estate of Horman*, 5 Cal. 3d 62, 77.)

A statute governing imitation milk first went into effect in California on July 22, 1919. (Stats. 1919, p. 89.) This legislation appears to have been enacted in response to the first "filled" and "imitation" milks which came on the market in bulk around 1916. ("Substitute Milk," Consumer Reports, January 10, 1969.) In many of its aspects, the 1919 legislation resembled Chapter 6 and it came before our Supreme Court in *In re Reineger*, 184 Cal. 94, in 1920. In that case the court, as pointed out *supra*, held, that resembling products are subject to reasonable regulations under the police power.

We note plaintiffs' citation of decisions from other jurisdictions which exempted Coffee-Rich from their particular imitation milk statutes. Of course, we interpret here neither the laws of other states nor our own superseded milk legislation. We recognize, too, that there are specific provisions in the Health and Safety Code dealing with foods. (Health and Safety Code, section 26000 et seq.). Nevertheless, the Sherman Food, Drug and Cosmetic Law to which plaintiffs inferentially refer, also contains an express injunction that its provisions are to be construed so as to not be in conflict (Health and Safety Code, section 26052) with related provisions of the Agricultural Code. Section 38906 in turn provides unequivocally that in the event of a conflict between Chapter 6 and the Health and Safety Code, the former must prevail. Chapter 6 therefore is the Legislature's judgment that products resembling milk products should be regulated by specific

enactments in addition to the Sherman Food, Drug and Cosmetic Laws therein contained. When we note the extensive and detailed regulation of the dairy industry itself by laws other than the Sherman Law (footnote 11, *supra*), the legislature's judgment as written into 38906 appears to be neither unfair nor capricious. Finally, when the legislature's judgment is tested by the evidence spread over 2000 pages of Reporter's Transcript as to the particular potentialities of these resembling products, that judgment is vindicated by demonstration. On the overriding constitutional issue we are guided by, and defer to, the California Supreme Court. (*In re Reineger, supra,* 184 Cal. 94.)

*Hermetic Sealing*

Section 38903(e) exempts from the embrace of Chapter 6 *any* milk-resembling product subjected to a temperature high enough to achieve sterilization and packaged in a hermetically sealed container. The trial court having examined liquid Coffee-Rich and other products meeting the requirements of section 38903(e) which have uses similar to liquid Coffee-Rich, found the latter products were "indistinguishable." Plaintiffs therefore contend that there is no reasonable basis for differentiating between Coffee-Rich and its (sterilized and hermetically sealed) competitors.

The trial court found as to section 38903(e): "* * * the Legislature had a reasonable basis for concluding that food products which are hermetically sealed and in a sterile condition would be less susceptible to the growth of microorganisms than food products which are not sterile or hermetically sealed, and therefore had a valid reason for establishing the exemption defined by that subdivision."



"A classification is reasonable, * * * only if there are differences between classes and the differences are reasonably related to the purpose of the statute." (*Werner v. Southern Calif. Association Newspapers,* 35 Cal. 2d 121, 131.) One of the purposes of Chapter 6 is the protection of public health. (Section 38902(b).) Plaintiffs cite evidence which shows that hermetically sealed products cease to be sterile when the seals are broken whereas liquid Coffee-Rich, *as long as it remains in a frozen state,* is free from harmful bacteria and organisms. The gist of plaintiffs' position on this issue at trial was that freezing a product is preferable to the sterilization and hermetically sealing required by section 38903(e) since the latter form of preservation is susceptible to casual damage (piercing, breaking) whereas the former is not exposed to such fortuities. However, a sterilized product hermetically sealed is no longer hermetically sealed or sterilized when the seal is broken. Thus, plaintiffs seek to establish an unreasonable discrimination by emasculating the standard of comparison.[12] The exception of sterilized and her-

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[12]Plaintiffs attempted to establish by vigorous cross-examination of defendants' experts that hermetically sealed products are susceptible to contamination. Plaintiffs' failure on this issue is illustrated by the following exchange:

"Q BY MR. LEVITAS: Hermetically sealed cans, for example, could be punctured or damaged in similar ways to bags, is that correct? A To a lesser extent, yes. Q You have seen hermetically sealed cans which have been punctured, have you not? A Yes. Q By the way, referring to Plaintiffs' Exhibit 10, do you know whether or not that's a foil-lined bag? A I have never seen this kind of package before. I don't—I would have to open it to find out. Q So far as you know, that bag could either be foil lined or not? A Right. Q Can a hermetically sealed sterile product such as Praise have bacteriological deterioration while it is canned? A Yes, if the contaminant had gained access to it during packaging or through damage during distribution. Q Now, assume that there was no access during packaging and

(This footnote is continued on next page)

metically sealed products does not appear in the statutory precursor to section 38903, section 38986. It is an extension of the exception granted by former section 38986 (now contained in section 38903(b)).

The Legislature, with the health of the public in mind, concluded that hermetic sealing, and sterilization, of products resembling milk products, was to promote and protect the public's health. Hermetic sealing is available to plaintiffs.[13] If freezing is a similar and acceptable mode of preserving resembling milk products, the matter should be presented to the

let's assume it is free from further harm to the can, do the type of bacteria normally found in a standard plate count penetrate through seams or linkages in the can? A Not unless they are broken. Q And therefore, assuming there were no—no break in the can, the product should be substantially—in the substantially same bacteriological condition that it was in when it was packaged, is that correct? A Bacteriologically, if it were—if it were sterile when it was placed in."

[13]"THE COURT: Yes. Taking a small phase of the matter, the hermetically sealed matter still bothers me. It does seem to me there is a valid distinction between the hermetically sealed and the nonhermetically sealed and, as I stated during the trial, if you recall, I said why doesn't the plaintiff avoid this problem by putting their products in such a container. You may or may not recall.

"MR. LEVITAS: [plaintiffs' counsel] I remember the Court asked twice, if I remember correctly. THE COURT: Yes. Why not get in the same category as Carnation? I didn't see any mechanical or expense matter involved. MR. LEVITAS: The only purpose that would be served by doing that would be avoiding the application of the statute, avoiding regulation. THE COURT: Isn't that a purpose—you are in business to make money. You are not proving any principle here. MR. LEVITAS: People don't usually litigate for that purpose. There is a principle at stake. THE COURT: Yes, there is a principle at stake. In that sense it seems like almost the blind anger of the bull in the arena."

At oral argument, however, plaintiffs' counsel contended that considerations of cost militate against plaintiffs turning to hermetic sealing. Viewed to its best advantage, the record on this question is far too inadequate to bring this question within the purview of this or any court.



Legislature. Nothing indicates that the benefits of freezing vis-a-vis sterilization and heremetically sealing was presented to the Legislature prior to the 1968 enactment of Chapter 6 or at any other time. Legislative committees are empowered and are undoubtedly interested in ascertaining the relative merits of each, not alone on testimony of experts on the subject (which is all this court has) but such committees have the means and the responsibility to make complete and competent investigation. In the absence of evidence of any arbitrary action by the Legislature on this facet of the subject we feel that this court should not in the first instance assume the duties of investigation and fact finding imposed on a legislative committee and in the final analysis, upon the Legislature itself." * * * [U]nder the doctrine of separation of powers neither the trial nor appellate courts are authorized to 'review' legislative determinations." (*Lockard v. City of Los Angeles*, 33 Cal.2d 453, 460, cited in *Eye Dog Foundation v. State Board of Guide Dogs for the Blind*, 67 Cal.2d 536, 545.) Further, there is no showing that plaintiffs are being unreasonably, economically or otherwise disadvantaged by this requirement. (See footnote 13, *supra*.) There must, however, not only be a showing of economic disadvantage for legislation to be invalidated on that ground: "* * * a state statute may not be struck down as offensive of equal protection in its schemes of classification unless it is *obviously arbitrary* * * *." (Emphasis added.) (*McGowan v. Maryland*, 366 U.S. 420, 535, separate opinion by Frankfurter, J.) No such showing has been made either in the trial or this court.

*Charitable and Penal Institutions.*

Section 38904 provides that no products resembling milk products shall be used in any penal institutions or in any of the charitable institutions that receive assistance from the state. The trial court found that there is no valid basis, either in the state constitution or the police power of the state, to regulate, particularly by prohibition, the sale of a class of products to charitable institutions but found the restriction valid as to state penal institutions.[14]

The prohibition of section 38904 first appeared in imitation milk and milk products legislation in 1931. (Stats. 1931, p. 459.) The most recent precursor of section 38904 is former section 38902. No litigation or other background in respect of this section has been called to our attention. However, we note the somewhat unaccountable testimony of the regional manager of one of plaintiffs' that plaintiffs' products have been sold to Vacaville Hospital and Folsom Prison. The only argument made by the State to sustain the section is that: "* * * in exercising its paternal control over prisoners' and patients' diets, [] it should be permitted to select products which are known to satisfy nutritional needs."

The record is clear, however, that plaintiffs' resembling products are wholesome and nutritious and

[14]The trial judge, in stating his view on this subject to counsel, remarked:

"When it comes to charitable institutions I could see no logical distinction for this requirement. I could see no sense to the requirement with charitable institutions [that] there be this limitation on the use of this. To me it is simply a matter of a lobbying effort without rational relationship to the end sought to be achieved."

We agree and would add that the same logic appears to apply to penal institutions.



also show that whole milk is from a nutritional standpoint preferable only for infants and those who may require a specific type of medical care.

The State, in the exercise of its police power, has paternal responsibility to all of its residents to insure that food products of any kind consumed by the public are wholesome and in all respects proper for human consumption and that the public be adequately informed as to the nature of the product it is asked to purchase and consume. In the exercise of that responsibility and in aid of its desire to insure the public that products sold for human consumption will conform to laws and regulations, the State in a proper exercise of its police power must and should provide means of constant and continuous supervision. In its enactment of section 38903(e) the Legislature specifically exempts from supervision under Chapter 6 any milk-resembling product, sterilized and packaged in a hermetically sealed container, confident that it had fulfilled its responsibility to the public by that regulation.

Police power does not embrace the right to tell the public or any part of the public which of the products which do conform to the Agriculture Code the public may consume. Assuming, as section 38904 does, that resembling products do meet the requirements of the Agriculture Code, in the absence of any showing whatsoever justifying such a prohibition, it is arbitrary for the state to take the position that they may not be used in penal or charitable institutions. There is nothing to indicate that this provision is reasonably or in any way necessary to promote public health, safety or the general welfare of the community and it is therefore not a valid exercise of the state's police power.

(*Miller v. Board of Public Works,* 195 Cal. 477, 484; *McClain v. City of South Pasadena,* 155 Cal.App.2d 423, 434-35.)

We hold section 38904 to be invalid and unconstitutional.

*Records*

Plaintiffs contend that section 35191 is in its entirety an unreasonable burden on interstate commerce (all of plaintiffs' products are manufactured outside of California) and that the trial court's construction amounts to an impermissible judicial reformation of the statute. (*Mulkey v. Reitman,* 64 Cal.2d 529, 544.)

Section 35191 provides: "Every person that manufactures or imports any oleomargarine or margarine, or any substance designed as a substitute for butter, or that resembles butter, which is made wholly from pure milk or cream, or any product resembling a milk product, shall keep a record, which gives the quantity that is sold or purchased, the name and location of the seller and purchaser, the date, and the place to which it was shipped or delivered."

Relative to this provision the trial court found:

"23. The provisions of the Act which require the manufacturer or importer of any 'product resembling a milk product' to keep a record giving the quantity that is sold or purchased, and the name and location of the seller and purchaser, and the date and place to which it was shipped or delivered, shall apply only to a sale to a purchaser of the product upon a wholesale basis, or to a purchaser for resale to others or to any direct sales by the manufacturer to institutions; and so far as the law applies or purports to



apply to sales to consumers at retail, it is an unreasonable burden upon commerce and a denial of equal protection of the laws and an improper and excessive exercise of the police power."

Defendants point out that: "The purpose of the record-keeping requirement is to enable the distribution of a particular product to be traced. Thus, upon discovery of contamination, for example, distribution to ultimate consumers may be curtailed or perhaps entirely prevented with the assistance of the records required to be kept by importers and manufacturers." This argument commends itself to common sense and the promotion of public health. It is incorrect to claim that plaintiffs have been singled out for particularly onerous record keeping. One glance at section 61441 shows that the distributors and manufacturers of milk, cream and dairy products are held to far more extensive reporting requirements than those importing or manufacturing resembling products. Although the quoted finding expressly limits section 35191 to wholesalers, it seems to us that the limitation expressed in the finding is inherently implicit in the statute. The phrase "Every person who *manufactures* or *imports* * * *" (emphasis added) (section 35191) cannot reasonably include one who buys retail. The rule *noscitur a sociis* permits the meaning of a word to be enlarged or limited by reference to the object of the clause in which it is used (*People v. Stout,* 18 Cal.App.3d 172, 177). The use of the word "imports" in section 35191 was not intended to apply to an individual making a retail purchase in another state. The court's finding purporting to "sever" retail purchases from section 35191, we deem to be unnecessary. We hold that section 35191 was intended to apply only to those who manufacture or import for resale to retail outlets.

*Registration.*

Section 38941 requires that any person engaged in the manufacture of resembling milk products shall register the products with the Department. This requirement, plaintiffs say, unfairly singles them out as the dairy industry is not so regulated and the only other product which must be registered under the Agricultural Code is economic poison.

Registration is accomplished on a form supplied by the Department which requires that applicant list the ingredients of the product as well as the proposed label. The director of the department is required to grant the registration if the product complies with Chapter 6. (Section 38942). Only registered products may be sold. (Section 38944.) The bewildering variety of resembling products which an enterprising and imaginative industry can bring on the market, impels the conclusion that this regulation is sound if for no reason other than it serves the obvious purpose of detecting a dangerous product before it can reach the consumer. The fee—$5—is minimal. Listing of ingredients and labeling of the product can surely be accomplished without impeding the flow of commerce. The registration requirements for "resembling" products are simple compared to the myriad regulations imposed on the dairy industry, and are a practical and hopefully a salutary first step to ensure enforcement of Chapter 6.

We find section 38941 to be a constitutional exercise of police power.



*Labels.*

Plaintiffs question section 471(b) of the regulations of the Department which requires that labels of trade products which resemble milk products contain the source of the oils or fats in descending order of predominance, and that if an oil or fat has been hydrogenated, that that fact shall be stated. In its finding 32 the trial court held "* * * such regulation is a valid exercise of the police power since the public has a right to know the nature of the food products it consumes, and section 471(b) promotes one or more of the Legislature's stated purposes of the Act, and is authorized by sections 38902(b) and 38952 of the Act, if the Director determines the same to be in the public interest."

The regulation under attack (Section 471(b) of Title 3 of the Administrative Code) provides as follows:

> "The term 'filled product' or 'non-dairy product' shall be followed by a list of ingredients in the descending order of predominance in a type at least one half as large as the term 'filled product' or 'non-dairy products,' as the case may be. The source of the oil or fat shall be identified and if a blend, the source of the oils or fats shall be listed in descending order of predominance. If the oil or fat has been hydrogenated, the fact shall be stated."

Plaintiffs contend that there is no "constitutional basis" for section 471(b) in that section 38953, governing the labels of imitation milk products, makes specific reference to the "source of the oil other than milk

fat" whereas section 38952 (labels on resembling products) makes no mention of the source of the oil or fat contained in products resembling milk products.[15] Plaintiffs reason that even though, under both sections, the director of the department has authority to require information on the labels which he determines to be in the public interest, the failure of the legislature to mandate a specific type of source-information in 38952 (resembling products) discloses its intent to exclude such a statement from labels of resembling products. Issue is joined on the question whether fats and oils used in resembling products differ in nutritional and health aspects from milk fats. Testimony was marshalled by the litigants on this latter question. Although plaintiffs now argue that the types of oils used in their products are virtually the same, and that a description of their source is therefore meaningless,

[15]§38952: "Each container which contains a product resembling a milk product, shall be labeled with the name and address of the manufacturer or distributor, and the names of the ingredients contained in such product. Such product shall be labeled with a fanciful or brandname only, but the list of ingredients of a filled product shall contain the statement that the product is a 'filled product,' and the list of ingredients of a nondairy product shall contain the statement that the product is a nondairy product. Such information shall appear conspicuously upon the label of the container, in a manner established by the director through regulation. In addition, the director may, by regulation, require any other information to be included on the label which the director determines to be in the public interest. [Added by Stats 1968 ch 1250 §20.]"

§38953 provides: "An imitation milk product shall be labeled 'imitation' followed by the name of the milk product imitated. For example, an imitation milk product having the appearance and semblance of milk shall be labeled 'imitation milk.' No ingredient listing, other than the source of the oil or fat other than milk fat, is required on the container of an imitation milk product. There shall be included on the label of an imitation milk product the name and address of the manufacturer or distributor, and any other information which the director, by regulation, determines to be in the public interest. [Added by Stats 1968 ch 1250 §21.]"



their leading expert, Dr. George V. Mann of the Vanderbilt University School of Medicine, testified in great detail about the advantages of coconut oil. Since plaintiffs have made their case on the merits of coconut oil to the scientific community and to the public, nothing but good can come of the director's regulation that they proclaim that fact on their labels. If coconut, palm kernel, and babassu oils have, as another of plaintiffs' experts stated, "* * * virtually the same kinds of fatty acids in very much the same proportions" the public would only commend plaintiffs for their use. However, the fact cannot be contested that there are other oils which may be less excellent perhaps than coconut oil or babassu and the director's regulation that that fact, too, be made known, if it arises, can only benefit those who chose to consume the better oil, to wit: the public. Since "imitation milk" is statutorily defined in terms of oils or fats other than milk fat, used in combination with a milk product (section 38914), there is, of course, no other foreign ingredient to identify, and the legislative "intent" in making the specific proviso as to source-identification in section 38953 (labeling of imitation milk) and omitting it in section 38952 is amply explained.

Plaintiffs separately attack section 38952 (footnote 15, *supra.*) The trial court found:

"28. Section 38952 requires that labels may show fanciful or brand names only and prohibits a generic description of the product. No food product, other than those described in Chapter 1250, is subject to such limitation; labels of all other foods are required under California law and all foods under federal law to state the common or ordinary name of the product.

if any. Said requirement and said section are invalid, in that it has no reasonable relationship to the health or welfare and separately requires a violation of federal statutes and regulations thereunder."

The federal law referred to in finding 28 is 21 U.S.C. para. 343 (i) which requires that a product be labeled "with the common or usual name of the food." Plaintiffs contend that they cannot comply with the federal law, and use a "common or usual name," and at the same time use the "fanciful or brand name" required by section 38952 and they also argue that section 38952 impinges on their freedom of speech since it "suppresses the truth" about their products.

Both arguments are predicated on the unarticulated assumption that plaintiffs' products are, for want of a better generic term, "natural" foods. They are, of course, manufactured from many components in a lengthy process. They are "artificial" foods (which in and of itself does not detract from their value) and they are relatively new to a man's diet. 21 U.S.C. para. 343 (i) requires the common or usual name of a food "if any there be." Milk, apples and potatoes have common names, but what can the common name of a manufactured food be? One might suggest that such a common name is, in the instance of a filled product (section 38913), "filled product" (*see* "Substitute Milk", *supra*, Consumer's Reports, January 10, 1969), and for want of any better terms, "nondairy product" for those resembling milk products. (Section 38915). Section 38952 does not require that resembling products be labeled only "nondairy products" but makes allowance for brand names, as well. The common or usual name of a relatively new artificial or fabricated



food must be, as a logical matter, a "fanciful" or "brand" name—unless plaintiffs intend to label their products "milk" or "cream" which under no circumstances is a common or usual (nor an honest) name for a product that is neither milk nor cream and contains not a particle of either. The federal law cited in finding 28 does not conflict with section 38952. Section 38952 requires plaintiffs only to tell the truth, a matter of which they cannot validly complain. (*Paraco, Inc. v. Dept. of Agriculture*, 118 Cal.App.2d 348, 354.) Finally, plaintiffs' argument that section 38952 strips them of the use of their trademark property in "Coffee-Rich" and "Rich's Whip Topping" is not an argument. It is a mistaken assumption. The established statutory generic name of plaintiffs' products is "nondairy product." Coffee-Rich and the names of the associated products of the respective plaintiffs involved at bench are sufficiently fanciful, or clearly enough brand names, to be permissible under section 38952.

We hold section 38952 to be constitutional, and section 471(b) of the Department's regulations to be a proper exercise of the power of the Department.

Plaintiffs attack sections 38956 and 38954 as vague, uncertain and ambiguous.

§ 38956: "Trade products containers and labels shall not contain any combination of words, symbols, marks, designs, or representations commonly used or associated with the sale, advertising, or distribution of milk products. The labels shall not contain statements regarding milk products except those permitted by Section 38954 and any necessary factual statement regarding any ingredient milk products. [Added by Stats 1968 ch 1250 §21.]"

§ 38954: "Labels of products resembling milk products may contain references and comparisons of products with milk products as long as such statements are reasonable, relevant, truthful, complete, and not deceptive or misleading. The director may require satisfactory proof of the compliance of any statement with the provisions of this section. [Added by Stats 1968 ch 1250 §21.]"

The trial court found:

"29. Section 38956 prohibits manufacturers of trade products from using labels and advertising commonly used or associated with the sale, advertising or distribution of milk products. Said proscription as to what is 'commonly associated' with the sale, etc. of milk products is a vague, uncertain and ambiguous term which leaves persons subject to such requirement with no basis for determining what is unlawful, and said section is therefore invalid insofar as the words 'or associated,' are employed."

We do not agree.

It is the declared intention of the legislature to prevent false, misleading and deceptive marketing of products resembling milk products. (Section 38902(b).) Plaintiffs do not question the general power of the state to regulate labeling and advertising of food products but instead rely on the court's finding that the term "commonly associated" is too uncertain and vague a phrase upon which criminal and civil liability may be predicated. (*Market Basket v. Jacobsen,* 134 Cal.App. 2d 73, 81.)

The registration provisions of Chapter 6 (sections 38941-38946) effectively insulate plaintiffs from the imposition of sanctions, should they, as they contend,



"guess wrong" on what words are "commonly associated." As part of the required application, plaintiffs must submit the proposed label or labels for the product (Section 38942). If the director grants their application, the label is approved; if he capriciously denies it on the ground that the label is improper because it is commonly associated with milk products, plaintiffs may test that decision in the courts. Finally, it does not appear the phrase "commonly used or associated" is vague, especially if it is considered in tandem with the second sentence of section 38956 which prohibits *all* statements regarding milk products, except those permitted by section 38954. The obvious procedure is to submit such labels to the director for registration. If the application does not mention milk in any way, except as the resembling product may be validly compared to milk and its products (section 38954) we must assume it will be approved. Plaintiffs' competitive advantage is thus preserved, as is the public's right to know what nature of food it is being persuaded to digest.

*Tie-In Sales*

For reasons which are not apparent from the record, plaintiffs attack section 61390 which provides: "The requirement by any distributor or manufacturer of the acceptance by a purchaser, handler, or retailer of any product resembling milk products as a condition of receiving any milk product, any other product resembling milk products or any other product handled by such distributor or manufacturer is an unfair trade practice and unlawful. [added by Stats 1968 ch 1250 § 24.]"

The trial court found that this section denies plaintiffs equal protection of the law in that it does not

prohibit the tying of milk products to the sale of a resembling product. We disagree.

The subject of tying arrangements is within the domain of antitrust law (e.g. *United States v. Loew's, Incorporated,* 371 U.S. 23; *Northern Pacific Railway Company v. United States,* 356 U.S. 1; *International Salt. Co., Inc. v. United States,* 332 U.S. 392.) Under certain circumstances tie-in sales may violate section 3 of the Clayton Act, section 1 of the Sherman Act or section 5 of the Federal Trade Commission Act. (Generally, *see* Tucker, "The Validity of Tying Arrangements under the Antitrust Laws," 72 Harv.L.Rev. 50.) Thus it is clear that such practices may be prohibited as in fact they have been proscribed by section 61390.

A regulatory scheme is not invalid for its failure to cover the whole of a permissible field, since the legislature is free to recognize degrees of harm and confine its regulations to those practices it deems most harmful. (*Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control,* 65 Cal. 2d 349, 361.) Regulating resembling products as a separate class is entirely reasonable. (*People v. Western Fruit Growers,* 22 Cal.2d 494, 506-507.) As the Attorney General points out, the legislature apparently considered the typing of sales of resembling products to the sale of milk products a more likely situation than the converse since the resembling products lack the general acceptance and use of milk products. The legislative history of Chapter 6 completely validates this analysis and the record is barren of any evidence of injury or damage to plaintiffs by reason of this section.

Even though plaintiffs have not made their position clear, their real complaint is that sellers of tying products (in this instance, as not covered by section 61390, competitive sellers of resembling products) enjoy a monopolistic position in the market. (See *Times Picayune Publishing Co. v. United States,* 345 U.S. 594, 608.)[16] Quite apart from the fact that there is nothing in the record to suggest this, the forum for the adjudication of this issue lies elsewhere.



*Signs and Menu Notices.*

Finally, we note that the trial court in its finding 26 held section 38905 unreasonable:

"26. Section 38905 requires that certain establishments serving meals post signs or provide menu notices of specified minimum sizes stating 'beverages and products which are not milk products are served here.' Said statement is ambiguous, is not reasonably calculated to inform the public, and is misleading and does not inform the public. A sign in size sufficient to comply with the statute would be so large as to be unreasonable and to constitute an unreasonable burden on the person required to exhibit the same. The required size of the alternative menu notice is likewise unreasonable. For each of the foregoing reasons, the Court finds that the sign and notice requirements as to plaintiffs' products each constitutes a denial of due process and equal protection of the laws and is discriminatory, unconstitutional and void."

Plaintiffs introduced evidence at trial which showed that restauraters would rather discontinue use of prod-

[16]Since under section 61390 the tying product may also be a resembling product, it appears that it is only when the *tied* product is a milk product that section 61390 does not apply. To what extent this enhances the market position of competitive sellers of resembling products who also sell milk products we are unable to say in light of the absence of any facts bearing on this question.

ucts covered by Chapter 6 then post the sign required by section 38905. The record does not show how the menu requirement is unreasonable and to the contrary, shows that plaintiffs offered "menu-clip-ins" to its customers. However, the Attorney General does not appeal from this portion of the court's judgment and reiterated approval thereof at oral argument. We approve.

Since we have held sections 38905 and 38904 to be unconstitutional, we note section 38907 which provides for the severability of the various provisions of Chapter 6 in such an event. Our holdings on sections 38904 and 38905 do not invalidate the remainder of Chapter 6. (*City of La Mesa v. Tweed & Cambrell Mill*, 146 Cal.App.2d 762, 771, 772.)

The judgment is reversed and remanded with directions to modify the findings of fact, conclusions of law and the judgment (permanent injunction) in terms consistent with this opinion. Each side to bear their own costs.

Roth, *P. J.*

We concur:

Fleming, *J.*
Compton, *J.*

CERTIFIED FOR PUBLICATION.

Rehearing Denied, October 16, 1972.

## APPENDIX C.

### Statutes 1968.

CHAPTER 1250

*An act to amend Sections 32731, 32732, 32733, 32765, 32766, 32767, 32912, 32792, 32793, 32901, 32915, 33321, 33921, 35101, 35191, 35192, 61-305, 61411, and 61842 of, to amend the heading of Chapter 7 (commencing with Section 33901) of Part 1 of Division 15 of, to amend the headings of Article 2 (commencing with Section 33921) of Chapter 7 and Article 6 (commencing with Section 35101) of Chapter 12 of Part 1 of Division 15 of, to amend and renumber Section 61390 of, to add Chapter 6 (commencing with Section 38901) to Part 3 of Division 15 of, to add Section 61390 to, to repeal Sections 32507 and 32908 of, to repeal Section 35192 and to repeal Chapter 6 (commencing with Section 38901) of Part 3 of Division 15 of, the Agricultural Code, relating to products resembling milk products.*

[Approved by Governor August 12, 1968. Filed with Secretary of State August 12, 1968.]

*The people of the State of California do enact as follows:*

Section 1. Section 32507 of the Agricultural Code is repealed.

Sec. 2. Section 32908 of the Agricultural Code is repealed.

Sec. 4. Section 32731 of the Agricultural Code is amended to read:

32731. The director may do all of the following:

(a) Enter and inspect any premises or conveyance where any provision of this division is applicable.

(b) Take a sample of any milk, cream, product of milk or cream, or product resembling milk products.

(c) Impound and hold for analysis or as evidence any milk, cream, product of milk or cream, or product resembling milk products.

(d) Impound and hold for analysis or as evidence any container of milk, cream, or product of milk or cream.

(e) Examine, inspect, test or by other means determine the health of any cow or goat.

(f) Exclude from the herd any animal which produces milk that is unfit for human consumption.

Sec. 5. Section 32732 of the Agricultural Code is amended to read:

32732. No prosecution which is based upon a sample of milk, cream, a product of milk or cream, or a product resembling milk products shall be had unless a duplicate of the sample is left with the accused.

Samples which are taken in connection with the establishment of proof of fraudulent manipulation of the tests for the basis of payment for milk or cream, need not, however, be given to the accused.

Sec. 6. Section 32733 of the Agricultural Code is amended to read:

32733. Samples of milk, milk products, and products resembling milk products to be tested for coliform



bacteria shall be taken at the plant where packaged or from delivery vehicles owned or operated by the plant.

Sampling procedures and laboratory methods for the determination of coliform bacteria shall be established by regulations issued by the director to insure accuracy of the sampling.

Sec. 7. Section 32765 of the Agricultural Code is amended to read:

32765. The director may condemn any product of milk or cream or product resembling a milk product which is within any of the following classes:

(a) Impure, unclean, unwholesome, or stale.

(b) Produced or manufactured, handled, or kept in an insanitary place.

(c) Adulterated or mislabeled.

Sec. 8. Section 32766 of the Agricultural Code is amended to read:

32766. The director may destroy or mark for identification with a nontoxic substance, any condemned product of milk or cream or product resembling a milk product.

Sec. 9. Section 32767 of the Agricultural Code is amended to read:

32767. No manufactured product of milk or cream or product resembling a milk product may be destroyed by the director without due notice to the owner of the product, and a hearing before the director or an officer designated by him.

Sec. 9.1. Section 32792 of the Agricultural Code is amended to read:

32792. The director shall do all of the following:

(a) Collect, compile, and publish statistics relative to the dairy industry, oleomargarine, and products resembling milk products.

(b) Disseminate the statistics and other information useful to the general good and development of the dairy industry of the state.

Sec. 10. Section 32793 of the Agricultural Code is amended to read:

32793. The director shall provide blanks for reporting statistics on milk and milk products and on products resembling milk products. He shall, on or before the first of each month, cause to be mailed to each person that is engaged in operating any milk products plant, any plant in which products resembling milk products are manufactured, and to each market milk distributor such number of the blanks as may be necessary. Each person that is engaged in operating any such plant, or that is a market milk distributor shall, within 30 days after the blank is mailed to him, transmit to the director a full and accurate report of the amount of milk and milk products and products resembling milk products which he produced, purchased, manufactured or distributed during the preceding month.

Sec. 10.1. Section 32901 of the Agricultural Code is amended to read:

32901. It is unlawful for any person to sell, give away, deliver, or knowingly purchase or receive any milk, cream, product of milk or cream, imitation milk, imitation cream, product resembling a milk product, or any substitute for any milk product which does not



conform to the standards which are established by this division. It Is unlawful for any person to sell, give away, deliver, or knowingly purchase or receive as, or for, milk or cream any product which is prepared or manufactured by the mixing or blending of milk, skim milk, or any of the derivatives of milk or skim milk, with butter.

Sec. 10.2. Section 32915 of the Agricultural Code is amended to read:

32915. The labeling requirements of Sections 32912, 32913 and 32914 also apply to milk and cream which is sold in bulk to the wholesale trade and to milk and cream which is sold by any milk products plant for processing purposes. When any nonnutritive or artificial sweetener is added to any milk product or product resembling a milk product, the words "artificially sweetened" shall become a part of the name of the product.

Sec. 11. Section 32912 of the Agricultural Code is amended to read:

32912. Every milk product or product resembling a milk product at the time of sale to the retail trade shall be labeled and billed with the correct name of the product and shall conform to all other requirements for special labeling of the product which are provided in this division and the regulations for its enforcement.

Sec. 12. Section 33321 of the Agricultural Code is amended to read:

33321. It is unlawful for any person to do any of the following:

(a) Prevent, interfere with, or attempt to nullify in any way the work of any duly authorized representative

of the department or of an approved milk inspection service in the enforcement of any provision of this division.

(b) Interfere with or prevent any such representative from examining any records or books in the conduct of his official duty.

(c) Prevent or interfere with any such representative if he deems it advisable to secure samples of milk or any product of milk, product resembling milk products, imitation butter, or oleomargarine, or any substance which is designed to be used as a substitute for milk or any product of milk.

Sec. 13. The heading of Chapter 7 (commencing with Section 33901) of Part 1 of Division 15 of the Agricultural Code is amended to read:

CHAPTER 7. CHEESE PACKAGING ROOMS AND PLANTS FOR PRODUCTS RESEMBLING MILK PRODUCTS

Sec. 14. The heading of Article 2 (commencing with Section 33921) of Chapter 7 of Part 1 of Division 15 of the Agricultural Code is amended to read:

Article 2. Plants for Products Resembling Milk Products

Sec. 15. Section 33921 of the Agricultural Code is amended to read:

33921. All of the provisions of Chapter 6 (commencing with Section 33701) of this division, apply to any building or structure in which any product resembling a milk product is manufactured, processed, or compounded, except that food which does not affect the flavor or quality of such products may be handled in such building or structure.



Sec. 16. The heading of Article 6 (commencing with Section 35101) of Chapter 12 of Part 1 of Division 15 of the Agricultural Code is amended to read:

Article 6. Oleomargarine and Imitation Ice Cream Licenses

Sec. 17. Section 35101 of the Agricultural Code is amended to read:

35101. It is unlawful for any person, unless he has a license to do so, to engage in the business of manufacturing, freezing, or processing; or to sell, deal in, or furnish as a keeper of any hotel, restaurant, boardinghouse, or other place where meals are served and payment is received for the meals, any of the following:

(a) Oleomargarine, or margarine, colored oleomargarine or colored margarine, renovated butter, or a substitute for butter.

(b) Imitation cheese or substitute for cheese.

(c) Imitation ice cream or imitation ice milk.

Sec. 18. Section 35191 of the Agricultural Code is amended to read:

35191. Every person that manufactures or imports any oleomargarine or margarine, or any substance designed as a substitute for butter, or that resembles butter, which is not made wholly from pure milk or cream, or any product resembling a milk product, shall keep a record, which gives the quantity that is sold or purchased, the name and location of the seller and purchaser, the date, and the place to which it was shipped or delivered.

Sec. 19. Section 35192 of the Agricultural Code is repealed.

Sec. 20. Chapter 6 (commencing with Section 38901) of Part 3 of Division 15 of the Agricultural Code is repealed.

Sec. 21. Chapter 6 (commencing with Section 38901) is added to Part 3 of Division 15 of the Agricultural Code, to read:

CHAPTER 6. PRODUCTS RESEMBLING MILK PRODUCTS

Article 1. General Provisions

38901. The production and distribution of products resembling milk products, is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of the police powers of this state for the purpose of protecting the health, safety, and welfare of the people of this state.

38902. The Legislature further finds and declares all of the following:

(a) There is an increasing advent into the marketplace of food products which in appearance, taste and other physical characteristics resemble milk products, which are frequently mistaken by consumers for milk and milk products, which are used for the same or similar purposes as milk and milk products, which are frequently manufactured, transported and sold in the same places as milk and milk products, which are frequently packaged in the same types, sizes and shapes of containers as milk and milk products, which are suitable media for the growth and multiplication of microorganisms; but which food products contain fats and oils other than milk fat in combination with milk products or contain no milk products.



(b) It is necessary in order to prevent and avoid false, misleading and deceptive marketing of such products resembling milk products, and in order to prevent deception and confusion among consumers, and in order to protect public health, that this chapter be enacted, and that the director from time to time promulgate regulations governing the labeling, identification and sanitary production of all such products.

38903. The provisions of this chapter do not apply to:

(a) Oleomargarine subject to Chapter 8 (commencing with Section 39351).

(b) A distinctive proprietary food compound which complies with all of the following requirements:

(1) Not readily mistaken in taste for milk, or for evaporated, skim, condensed, or dried milk.

(2) Prepared and designed for feeding infants and young children.

(3) Sold exclusively by druggists, orphanages, child welfare associations, hospitals, and similar institutions or for shipment outside of this state.

(c) Imitation cheese subject to Chapter 8 (commencing with Section 39351).

(d) Imitation ice cream and ice milk subject to Chapter 7 (commencing with Section 39151).

(e) Any product resembling a milk product which resembling product is subjected to a temperature high enough to sterilize the product and is packaged in an hermetically sealed container.

38904. Except as provided in this section, no products resembling milk products shall be used in any of the charitable or penal institutions that receive assist-

ance from the state. If the state is informed in writing that government holdings of milk or milk products cannot be purchased or acquired by the state, the Department of General Services may purchase for use in state institutions such products if requested to do so by the director of the department which has control of any state institutions for which such product is intended.

38905. The following persons shall not place before any patron or employee, for use as food, any product resembling milk products, unless there is displayed in a prominent place in each room where the meals are served, a sign which bears the words "beverages and products which are not milk products are served here," in blackfaced letters of not less than four inches in height upon a white background, or unless the words are printed on a menu which is furnished to such patrons or employees, in legible type, no smaller than that which is used to describe other food items on the menu, and upon the same portion of the menu where other food items are described:

(a) The keeper or proprietor, person in charge or employee of any bakery, hotel, boardinghouse, restaurant, lunch counter, or any other place where food or drink is served to the public.

(b) A person who furnishes board for other than members of his own family, or any employee where such board is furnished as compensation or as a part of the compensation of any employee.

38906. If a provision of this chapter and a provision of the Health and Safety Code are applicable to the same person and subject matter, the provisions of this chapter shall prevail.



38907. If any article, section, subdivision, sentence or clause of any provision of this chapter is for any reason adjudged unconstitutional or unenforceable, such decision does not affect the validity of the remaining provisions of this chapter. The Legislature hereby declares that it would have enacted all provisions of this chapter irrespective of the fact that one or more of such provisions is adjudged unconstitutional or unenforceable.

38908. The provisions of this chapter shall not be construed as necessitating any alterations or deviations in the normal and traditional methods of manufacturing, distributing, and selling products resembling milk products, except insofar as such methods specifically violate provisions of this chapter.

Article 2. Definitions

38911. Unless the context otherwise requires, the definitions in this article govern the construction of this chapter.

38912. "Products resembling milk products" means any food product for human consumption, except those referred to in Section 38903, which has the appearance, taste, smell, texture or color of a milk product and which, taken as a whole, bears resemblance to a milk product, or could be mistaken for a milk product.

38913. "Filled product" means a product resembling a milk product, other than an imitation milk product, which filled product contains oils or fats other than milk fat in combination with a milk product.

38914. "Imitation milk product" means a product which contains oils or fats other than milk fat in combination with a milk product, and which complies with

the provisions of this chapter governing imitation milk products.

38915. "Nondairy product" means a product resembling a milk product, but which nondairy product contains no milk or milk solids.

38916. Nondairy products and filled products are collectively referred to in this chapter as "trade products."

Article 3. Standards

38921. An imitation milk product shall contain not less than the same percentage of milk solids not fat, and not less than the same percentage by weight of edible oils or fats, as milk solids not fat or milk fat, or both, are required by this code, or by any regulations thereunder, for the milk or milk product imitated. Any such imitation milk product may contain emulsifiers and stabilizers in a maximum percentage not to exceed six-tenths of 1 percent emulsifers or stabilizers, or both, or in such other maximum percentage as may be established from time to time by the director through regulation duly issued. Except for such emulsifiers and stabilizers, and for such fat or oil other than milk fat, an imitation milk product may not contain any ingredient other than an ingredient permitted in the milk or milk product imitated.

38922. The director may establish, upon the application of any interested person, definitions and standards of identity for any trade product or group of trade products, if he finds that the establishment of such standard would be in the public interest. Such standard shall not be construed to prohibit the sale of any trade product not meeting the standard, but shall prohibit the use of terms of identity assigned to products



meeting the standards by products which do not meet them.

38923. The standards of purity (bacterial standards) of imitation milk products shall be those of the milk product imitated.

38924. The director shall adopt regulations providing for the healthfulness and standard of purity of trade products. The regulations shall be those reasonably necessary to ensure that the products are safe for human consumption under the circumstances under which they are likely to be offered for sale and consumed.

38925. When the use of market milk or any derivative or component of market milk is required in any milk product, any fluid milk, fluid skim milk, fluid cream, milk fat or milk solids which is used in a product resembling or imitating such milk product shall be market milk.

Article 4. Plant Licensing

38931. It is unlawful to engage in the manufacture of products resembling milk products, unless a license for the then current calendar year for each separate plant or place used for such business is issued by the director pursuant to this article.

38932. Applications for a license shall be in the form which shall be prescribed by the director.

38933. The application shall be accompanied by a fee of one hundred dollars ($100).

38934. The director shall issue to each applicant that satisfies the requirements of this chapter a license which entitles the applicant to manufacture, sell, or distribute products resembling milk products for the

then current calendar year for which the license is issued, unless the license is sooner revoked or suspended.

38935. The license shall expire at the end of each calendar year, but shall remain in force during the month of January of the next succeeding year or such part of the month as may be necessary for the renewal of the license by the director.

38936. It is unlawful for any person to sell, give away, deliver, or to knowingly purchase or receive any product resembling milk products which has been produced in a plant that is in an insanitary condition, or that is handled by any carrier or any store or depot that is in an insanitary condition.

38937. Grounds for revocation or suspension of such license shall be the manufacture of products resembling milk products under unhealthful or insanitary conditions or which violate the provisions of Section 38924 or 38925.

Article 5. Product Registration

38941. Any person engaged in the manufacture of products resembling milk products, shall register the products with the department as provided by this article.

38942. Application for a registered product shall be in the form which shall be prescribed by the department and shall include the ingredients of the product, and the proposed label or labels for the product. The director shall grant such application if he determines that the product will comply or has complied with the provisions of this chapter.

38943. The application shall be accompanied by a fee of five dollars ($5). The information required by



Section 38942 shall be kept current and amended whenever any change is made.

38944. No product resembling milk products shall be sold unless it has an active registration on file with the department.

38945. In addition to any other penalty, the department may revoke or suspend the registration of any product resembling milk products for violation of the provisions of Sections 38921, 38922, and 38923, or Article 6 (commencing with Section 38951) or Article 7 (commencing with Section 38971) of this chapter or for nonpayment of the registration fee.

38946. All product registration made pursuant to this article shall be confidential. No information contained in the application for any such registration, or in the registration, shall be divulged by the director except if necessary for the proper determination of any court proceedings or hearing before the director.

Article 6. Labels

38951. Any person or association or corporation engaged in the manufacture, sale, or distribution of products resembling milk products shall label such products in accordance with the provisions of this article and with regulations which shall be adopted by the director. The labels may be submitted to the director for approval.

38952. Each container which contains a product resembling a milk product, other than an imitation milk product, shall be labeled with the name and address of the manufacturer or distributor, and the names of the ingredients contained in such product. Such product shall be labeled with a fanciful or brand

name only, but the list of ingredients of a filled product shall contain the statement that the product is a "filled product," and the list of ingredients of a nondairy product shall contain the statement that the product is a nondairy product. Such information shall appear conspicuously upon the label of the container, in a manner established by the director through regulation. In addition, the director may, by regulation, require any other information to be included on the label which the director determines to be in the public interest.

38953. An imitation milk product shall be labeled "imitation" followed by the name of the milk product imitated. For example, an imitation milk product having the appearance and semblance of milk shall be labeled "imitation milk." No ingredient listing, other than the source of the oil or fat other than milk fat, is required on the container of an imitation milk product. There shall be included on the label of an imitation milk product the name and address of the manufacturer or distributor, and any other information which the director, by regulation, determines to be in the public interest.

38954. Labels of products resembling milk products may contain references and comparisons of the products with milk products as long as such statements are reasonable, relevant, truthful, complete, and not deceptive or misleading. The director may require satisfactory proof of the compliance of any statement with the provisions of this section.

38955. On the labels of imitation milk products the use of pictures and symbols depicting dairy or agricultural activities, or associating the product with such activities, and use of dairy or agricultural terms



or words, or derivations or cognates thereof, shall be subject to restriction or prohibition by the director by regulation. The basis for such regulations shall be the degree to which such symbols or words make or fail to make a significant contribution to a truthful and complete representation of the product, or appear to be likely to be deceptive and misleading to the purchaser.

38956. Trade products containers and labels shall not contain any combination of words, symbols, marks, designs, or representations commonly used or associated with the sale, advertising, or distribution of milk products. The labels shall not contain statements regarding milk products except those permitted by Section 38954 and any necessary factual statement regarding any ingredient milk products.

38958. The provisions of this article shall not affect the manufacture, sale or distribution of products resembling milk products which have been sold or distributed in this state prior to the effective date of this chapter, if a schedule of compliance with the provisions is filed with the director within 30 days of the effective date.

The director shall determine whether the schedule reflects a reasonable time in which the labels of the products are to be changed to comply with the provisions of this article. The director shall, in making the determination, consider the manufacturer's, seller's, or distributor's desire to retain product identity and the consumer's desire to purchase familiar products as well as his actual inventory of such labels. If the director determines that the schedule does not reflect a reasonable time for compliance, he shall reject the schedule stating his reasons in writing. Within 30 days of

the rejection, the petitioner may file an amended schedule of compliance with the director. If the director rejects the amended schedule, the provisions of this article shall become applicable within 30 days of notice of the final rejection.

Article 7. Advertising and Display

38971. No product resembling a milk product shall be advertised, displayed for sale, or sold in any manner or under any circumstances or conditions that is likely to mislead, deceive, or confuse consumers into believing such products are milk products.

38972. The director may adopt regulations to enforce the provisions of this article. In adopting such regulations, the director shall consider and follow, insofar as practical, the provisions of Sections 38954, 38955, and 38956, as well as any other relevant considerations. In addition the director may distinguish between different products or types of products on the basis of the nature of the product, its labeling, the manner in which it is customarily presented or is likely to be presented to the consumer, and any other relevant factors, if he determines such differentiation is warranted and in the public interest.

Article 8. Administration

38981. The director shall enforce the provisions of this chapter.

38982. The director may adopt any regulations necessary for the implementation and adequate enforcement and administration of the provisions of this chapter and that he determines are necessary to protect the public health and to prevent deception and confusion among consumers.



38983. The regulations shall be adopted after a public hearing in accordance with Article 4 (commencing with Section 11420) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code.

38984. Notwithstanding any other provisions of this chapter to the contrary, the director shall by regulation make provisions for the transportation into the state and subsequent sale of nondairy products produced outside the state and labeled, in accordance with federal law.

38985. Notwithstanding any other provisions of this chapter to the contrary, the director shall by regulation waive any of the provisions of this chapter as they apply to products resembling milk products manufactured for sale and distribution exclusively outside of this state, provided that the regulations contain provisions ensuring that the products will not be made available or sold to consumers in this state.

38986. If the director determines that fees established to enforce and administer the provisions of this chapter exceed the cost of enforcing and administering the provisions, he may by regulation reduce the fees accordingly. If he determines that the fees are insufficient to defray the costs, he may by regulation establish and collect from processing milk distributors and producers, assessments based upon the fluid milk, fluid skim milk, fluid cream, milk fat, or milk solids not fat, utilized in products resembling milk products.

38987. Any moneys which are received by the director or the department pursuant to this chapter shall be paid into the State Treasury to the credit of the Department of Agriculture Fund to be expended as provided by the provisions of this chapter.

Sec. 22. Section 61305 of the Agricultural Code is amended to read:

61305. "Dairy product" means buttermilk; flavored milk drinks; bottled milk drinks which are sold under a trade name; modified milk; acidophilus miik; skim milk for human consumption; milk and cream in combination which does not come within the statutory definitions of milk or cream; ice cream, ice milk, and sherbet, separately, or in combination; ice cream mix; ice milk mix; cottage cheese; butter; American or cheddar cheese; Monterey jack cheese; pasteurized process cheese; eggnog; sour cream dressing; yogurts; and any filled product, or any imitation milk product in which the use of market milk or any component of market milk is required by Section 38925.

Sec. 23. Section 61390 of the Agricultural Code is amended and renumbered to read:

61391. Solicitation by, or collusion or joint participation between or among, any manufacturer, distributor, producer, wholesale customer, retail store, consumer, or any representative of any of them, to commit any of the unfair practices which are prescribed in this article, or the use of any misrepresentation, threat, intimidation, or boycott to effectuate the commission of such unfair practices, makes any person that participates in such unfair practices subject to the penalties of this chapter.

Sec. 24. Section 61390 is added to the Agricultural Code, to read:

61390. The requirement by any distributor or manufacturer of the acceptance by a purchaser, handler, or retailer of any product resembling milk products as



a condition of receiving any milk product, any other product resembling milk products or any other product handled by such distributor or manufacturer is an unfair trade practice and unlawful.

Sec. 24.1. Section 61411 of the Agricultural Code is amended to read:

61411. Every distributor in any marketing area shall file with the director schedules and any amendments to the schedules which set forth the prices at which each such distributor is selling, offering, or agreeing to sell in such marketing area any of the following: market milk; market cream; buttermilk; flavored milk drinks; bottled milk drinks which are sold under a trade name; modified milk; acidophilus milk; skim milk for human consumption; milk and cream in combination which does not come within the statutory definitions of milk or cream; cottage cheese; eggnog; sour cream dressing, yogurts; and any filled milk product or any imitation milk product in which the use of market milk or any component of market milk is required by Section 38925.

Price filing is not required for any other dairy product.

Sec. 25. Section 61842 of the Agricultural Code is amended to read:

61842. Class 1 comprises:

(a) Any fluid milk, fluid skim milk, or fluid cream that is supplied to consumers as market milk, market skim milk, or market cream or concentrated milk.

(b) Any combination of market milk, market skim milk, and market cream, or any market milk which is not sterilized and packaged in hermetically sealed containers.

(c) Any other dairy product or products resembling milk products in which the use of market milk or any components or derivatives of market milk is required by, or pursuant to, the provisions of this code.

(d) Any fluid milk, fluid skim milk, fluid cream, milk fat, or milk solids not fat which is used in the standardizing or fortifying of market milk or any dairy product which is defined in this section as class 1.

(e) Any product which is required by any regulations adopted by the director pursuant to Article 2 (commencing with Section 36631), Chapter 1, Part 3, Division 15 of this code to be made from market milk or any components or derivative of market milk.

(f) Any fluid milk, fluid skim milk, fluid cream, milk fat or milk solids not fat used in any filled product or imitation milk product, when the product imitated or resembled, is defined in this section as class 1.

## APPENDIX D.

**Modified Findings of Fact and Conclusions of Law.**

Superior Court of the State of California, for the County of Los Angeles.

Coffee-Rich, Inc., a Delaware corporation, and Rich Products Corporation, a Delaware corporation, Plaintiffs, v. Jerry W. Fielder, as Director of Agriculture of the State of California, et al., Defendants. No. 943 548.

The above entitled action came on regularly for trial on September 15, 1969, in Department 68 of the above entitled Court, the Honorable Samuel L. Kurland, Judge Presiding. Plaintiffs Coffee-Rich, Inc. and Rich Products Corporation appeared by Flint and MacKay by Edwin Freston and Louis W. Myers II, Esquires, and Arnall, Golden and Gregory of counsel by Ellis Arnall and Elliott H. Levitas, Esquires. Defendants Richard Lyng and Jerry W. Fielder, as Directors of Agriculture of the State of California; R. L. Van Buren, as Chief of the Bureau of Dairy Service of the Department of Agriculture of the State of California; and L. H. Lockhart, as Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California, appeared by Thomas C. Lynch, Attorney General; Walter S. Rountree, Assistant Attorney General; Walter E. Wunderlich and John C. Hamilton, Deputy Attorneys General, by Walter S. Rountree, Assistant Attorney General, Walter E. Wunderlich and John C. Hamilton, Deputy Attorneys General. A dismissal was filed as to all fictitiously named defendants.

Evidence, both oral and documentary, was received to and including October 2, 1969. After arguments on

October 16, 1969, the cause was submitted as of December 1, 1969, for decision. By memorandum decision dated March 27, 1970, the Court indicated its intended decision. On February 2, 1971, the Court caused Findings of Fact and Conclusions of Law and Judgment (Permanent Injunction) to be filed. On February 3, 1971, the Judgment (Permanent Injunction) was entered.

An appeal was thereafter taken from the Judgment (Permanent Injunction). On September 19, 1972, the Court of Appeal, Second Appellate District, Division Two, filed its opinion in the matter of *Coffee-Rich, Inc. v. Fielder*, 27 Cal.App.3d 792 (1972). The decision of the Court of Appeal reversed the Judgment (Permanent Injunction) entered herein on February 3, 1971, and remanded the matter to this Court with directions to modify the Findings of Fact, Conclusions of Law and Judgment (Permanent Injunction) in terms consistent with the opinion of the Court of Appeal. The Court now being fully advised in the premises, makes the following:

## MODIFIED FINDINGS OF FACT

1. Plaintiffs Coffee-Rich, Inc., and Rich Products Corporation are corporations duly organized and existing under and by virtue of the laws of the State of Delaware with their principal places of business in Buffalo, New York, and are duly qualified to do business in the State of California.

2. Jerry W. Fielder as the successor to Richard Lyng is the Director of Agriculture of the State of California. R. L. Van Buren is Chief of the Bureau of Dairy Service of the Department of Agriculture of



the State of California. L. H. Lockhart is a Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California. The individually named defendants were joined as parties in their official capacities and not otherwise.

3. The production and distribution of products resembling milk products is a business affected with a public interest.

4. There is an increasing advent into the market place of food products which in appearance, taste and other physical characteristics resemble milk products, which are frequently mistaken by consumers for milk and milk products, which are used for the same or similar purposes as milk and milk products, which are frequently manufactured, transported and sold in the same places as milk and milk products, which are frequently packaged in the same types, sizes and shapes of containers as milk and milk products, which are suitable media for the growth and multiplication of micro-organisms; but which food products contain fats and oils other than milk fat in combination with milk products or contain no milk products.

5. Statutes 1968, Chapter 1250 (hereinafter referred to as "Chapter 1250") was enacted by the Legislature in order to prevent and avoid false, misleading and deceptive marketing of products resembling milk products, and in order to prevent deception and confusion among consumers, and in order to protect the public health, safety and welfare.

6. The prevention and avoidance of false, misleading and deceptive marketing of products resembling milk products, and the prevention of deception and confusion among consumers as to products resembling

milk products, and the protection of the public health, safety and welfare as to products resembling milk products, are each matters properly within the ambit of the State's police power.

7. There is an actual dispute and controversy between the parties concerning the applicability of Chapter 1250 and the regulations promulgated thereunder to plaintiffs' products, "Coffee-Rich," "Rich's Whip Topping," "Sundi-Whip" and "Spoon n' Serve," and as to the constitutionality of Chapter 1250 and the regulations promulgated thereunder as applied or threatened to be applied to plaintiffs' said products. This is therefore a proper action for declaratory relief with respect to said dispute and controversy.

8. Coffee-Rich is the sole product manufactured by Coffee-Rich, Inc., which is the owner of the trademark and trade name of "Coffee-Rich." Coffee-Rich, Inc., manufactures Coffee-Rich in the State of New York and sells it in interstate commerce to wholesale food distributors in California. These wholesale distributors in turn sell Coffee-Rich to institutions such as restaurants, hospitals, schools, vending machine operators, etc., and to retail outlets. In the case of certain of the large grocery chains, Coffee-Rich is sold directly to the retailers in California.

Coffee-Rich is sold only in hard-frozen form, except for some Coffee-Rich which is sold to institutions in powdered form. The product is sold by retail stores only in hard-frozen form.

9. Coffee-Rich is a non-dairy coffee whitening agent which serves the same functions that are served by milk products and other food products as an additive to coffee, tea or other hot beverages to whiten and cool



them. Coffee-Rich can also be used in cooking and on cereals and fruit and is so advertised.

10. Rich Products Corporation is the owner of the trademarks and trade names "Rich's Whip Topping," "Spoon n' Serve" and "Sundi-Whip" and of the United States Letters Patent under which the products are manufactured. Coffee-Rich is a developmental outgrowth of the subject of these patents. Rich Products Corporation manufactures the Rich Toppings named above in the State of New York and sells them in interstate commerce to wholesale food distributors in California. Wholesale distributors in turn sell Rich Toppings to retail outlets and to institutions such as restaurants, hospitals, schools, prisons, vending machine operators, etc. In the case of certain of the large grocery chains, the Rich Toppings are sold directly to the retailers in California. Rich Toppings are sold in frozen form.

11. Rich's Whip Topping is a hard-frozen man-made vegetable whipping emulsion which is sold to the public at retail in aerosol or pressurized cans. The topping, after thawing, is emitted in aerated form for use as a whipped topping and filler for pies, cakes, puddings, desserts, beverages and other foods. Rich's Whip Topping is also sold for institutional use in non-pressurized containers which, after thawing, is mechanically beaten or whipped into a topping for such foods. Sundi-Whip is the same product as Rich's Whip Topping and is sold by Rich Products Corporation to the institutional trade. Spoon n' Serve is a frozen pre-aerated vegetable whipped topping which is sold to the public at retail in molded plastic containers. It is applied by the consumer by spooning the pre-whipped topping from the container onto the food or beverage. Spoon

n' Serve is a non-dairy topping for pies, cakes, puddings, desserts, beverages and other foods. It is also used as a filler for pies, cakes, puddings, desserts and other foods.

12. Plaintiffs' packaged products sold at retail in stores are prominently labeled as nondairy products. A statement of the ingredients of the products is attached to and displayed on all containers in which they are packaged by the plaintiffs. Such labeling is not misleading or deceptive. There is no showing of deception of the public in connection with the purchase of any such labeled products. There is no showing of any false or misleading advertising in connection with the sale or distribution of the products, nor that any claim is being made that they are more nutritious than milk products.

13. "Coffee-Rich," "Rich's Whip Topping," "Sundi-Whip" and "Spoon n' Serve" are products which are used for the same or similar purposes as milk products and which for many purposes are substitutes therefor.

14. "Coffee-Rich" in hard-frozen form or said hard-frozen product as thawed (but not powdered "Coffee-Rich"), "Rich's Whip Topping," "Sundi-Whip" and "Spoon n' Serve," each, when ready to be consumed, taken as a whole, could be mistaken for a milk product, although plaintiffs' products have distinctive differences from milk products in appearance, taste, odor, color or texture, and each of said products is therefore subject to Chapter 1250.

15. A product known as "Rich's Whip Topping" was sold in California in 1946 and 1953. The product was the subject of two lawsuits: *B. C. Whelan v. A. A. Brock*, Los Angeles Superior Court No. 521 006 (1947) and *Rich Products of California, Inc. v. A. A.*



*Brock*, Los Angeles Superior Court No. 597 020 (1953). As a result of *Whelan v. Brock, supra,* Rich's Whip Topping was held not to be an "imitation cream" as that term was defined in 1946 by Agricultural Code section 593. (All statutory references are to the Agricultural Code unless otherwise designated.) As a result of *Rich Products of California v. Brock, supra,* Rich's Whip Topping was held not to be an "imitation milk product" as that term was defined by section 651 as of January 2, 1953.

16. After 1947 section 593 was repealed. There is no definition of "imitation cream" in the current Agricultural Code.

17. After January 1953 section 651 was substantially amended several times and repealed.

18. The current section 38912 of the Agricultural Code is substantially different from the 1946 version of section 593 and the 1952-53 version of section 651. Section 38912 is not identical either to the 1946-47 version of section 593 or to the January 1953 version of section 651.

19. As of 1953 the products Coffee-Rich and Spoon n' Serve were neither sold not distributed in California. Neither product was manufactured until approximately 1960 or thereafter.

20. The 1953 version of Rich's Whip Topping differed in color from the current version of that product. The ingredients of the current version of Rich's Whip Topping differ substantially from the ingredients of both the 1946 and 1953 versions of the product then labeled "Rich's Whip Topping."

21. Liquid "Coffee-Rich" has substantially the same chemical composition, appearance, taste, smell,

texture and color as certain nondairy products which are sterilized and packaged in hermetically sealed containers and are exempted from the operation of Chapter 1250 by section 38903, subdivision (e). The exempted nondairy products are designed for and used for the same uses as plaintiffs' products in issue. The Court has examined samples of "Coffee-Rich" and of said hermetically sealed and sterile nondairy products and finds them indistinguishable. However, the Legislature had a reasonable basis for concluding that food products which are hermetically sealed and in a sterile condition would be less susceptible to the growth and multiplication of micro-organisms than food products which are not sterile or hermetically sealed, and therefore had a valid reason for establishing the exemption defined by that subdivision. Plaintiffs are not being unreasonably disadvantaged in a legal context by the exemption. The exemption is not obviously arbitrary.

22. There is nothing in the record which indicates that prohibiting or restricting the use of products resembling milk products in charitable and penal institutions receiving assistance from the State as provided in section 38904 is reasonable or in any way necessary to protect the health, safety and welfare of the people of the State of California.

23. Section 35191 requires that those who manufacture or import products resembling milk products shall keep a record giving the quantity that is sold or purchased, and the name and location of the seller or purchaser, and the date and place to which it was shipped or delivered. Section 35191 does not apply to retail sales to consumers. The record keeping requirement of section 35191 protects the health, safety



and welfare of the people of California in that it enables the wholesale distribution of a particular product to be readily traced and, in the event of contamination or other defect in the product, would allow its distribution to ultimate consumers to be curtailed or even prevented. The record keeping and reporting requirement imposed upon distributors and manufacturers of milk, cream and dairy products are far more extensive than those imposed upon the manufacturers and importers of products resembling milk products.

24. The provisions of Article 4 of the Act, which include sections 38931 to 38937 relating to "plant licensing" are not applicable to plants for the manufacture of the subject products outside the State of California.

25. Section 38941 requires that any person engaged in the manufacture of products resembling milk products shall register such products with the Department. Under section 38942, application for registration is accomplished by completing and filing with the Department a form provided by the Department. The form requires the listing of the ingredients of the product and must be accompanied by the proposed label or labels for the products sought to be registered. The registration requirements for products resembling milk products are simple compared to the numerous regulations imposed on the dairy industry. The registration requirement protects the health, safety and welfare of the people of California in that it allows the detection of dangerous products to occur prior to the time they reach consumers.

26. Section 471(b) of Title 3 of the California Administrative Code requires that the labels of trade products (filled products (sections 38913 and 38916) and nondairy products (sections 38915 and 38916))

which resemble milk products contain the source of the oil or fat, and, if a blend, the source of oils and fats shall be in descending order of predominance; and if an oil or fat has been hydrogenated, that fact shall be stated. Section 471(b) of Title 3 of the California Administrative Code informs the public of the nature of the oil or fat contained in the trade product which is being offered and therefore promotes one or more of the legislative purposes of Chapter 1250 enunciated in section 38902(b) and was therefore properly promulgated by the Director pursuant to sections 38902 (b) and 38952 in the public interest.

27. Section 38952 requires that each container which contains a product resembling a milk product may be labeled with a fanciful or brand name only. "Coffee-Rich," "Rich's Whip Topping," "Sundi-Whip" and "Spoon n' Serve" are fanciful or brand names within the meaning of section 38952. The statutory generic name of each of plaintiffs' products (Coffee-Rich, Rich's Whip Topping, Sundi-Whip and Spoon n' Serve) is "nondairy product" (Section 38915). United States Code section 343(i) requires that a product be labeled with "the common or usual name of the food, if any there be. . . ." Section 38952 is not in conflict with 21 U.S.C. section 343(i). Section 38952 promotes one or more of the legislative purposes of Chapter 1250 enunciated in section 38902(b) and therefore protects the health, safety and welfare of the people of California.

28. Section 38956 prohibits the containers and labels of trade products (filled products (sections 38913 and 38916) and nondairy products (sections 38915 and 38916)) from containing any combination of words, symbols, marks, designs, or representations



commonly used or associated with the sale, advertising, or distribution of milk products except those permitted by section 38954. Section 38956 promotes one or more of the legislative purposes of Chapter 1250 enunciated in section 38902(b) and therefore protects the health, safety and welfare of the people of the State of California. The term "commonly used or associated" when read in light of sections 38956 and 38954 is a sufficiently certain standard to determine what is permitted and prohibited in that section 38956 prohibits reference to milk products except to the extent that a resembling product may be validly compared to milk and its products and refers to ingredient milk products all as permitted by sections 38954 and 38956.

29. Section 61390, which prohibits the tying of products resembling milk products to the sale of a milk product, any other product resembling milk products, or any other product handled by a distributor, constitutes a valid exercise of the State's police power in that it tends to prohibit monopolies and combinations which may otherwise be prohibited by State and Federal anti-trust laws.

30. Section 38905 requires certain establishments serving meals to post signs or provide menu notices of specified minimum sizes stating "beverages and products which are not milk products are served here." Said statement is ambiguous and misleading and does not inform the public. Exhibiting a sign of sufficient size to comply with section 38905 would constitute an unreasonable burden upon the person or persons subject to Chapter 1250.

31. Chapter 1250 and the regulations promulgated pursuant thereto have only an indirect and incidental effect on interstate commerce.

32. By enacting section 38907, the Legislature intended that if any article, section, subdivision, sentence or clause of any provision of Chapter 1250 is for any reason adjudged unconstitutional or unenforceable, such decision does not affect the validity of the remaining provisions of Chapter 1250. In enacting section 38907, the Legislature declared that it would have enacted all provisions of Chapter 1250 irrespective of the fact that one or more of such provisions were adjudged unconstitutional or unenforceable.

33. Any paragraph or any portion of a paragraph hereinafter set forth as a Modified Conclusion of Law which should more appropriately be set forth as a Modified Finding of Fact is hereby declared to be a Modified Finding of Fact and is hereby incorporated herein by reference.

## MODIFIED CONCLUSIONS OF LAW

1. Any paragraph or any portion of a paragraph heretofore set forth as a Modified Finding of Fact which should more appropriately be set forth as a Modified Conclusion of Law is hereby declared to be a Modified Conclusion of Law and is hereby incorporated herein by reference.

2. Food products are a basic subject matter for regulation in the interest of the public health, safety and welfare, and the subject matter of Chapter 1250 is therefore within the police power of the State of California. The state has a right to insure the health, safety and welfare of the public and their right to know what they are consuming by labeling requirements reasonable in character and designed to promote the end sought within constitutional limits.



3. Each of plaintiffs' products referred to in Modified Finding of Fact number 14 set forth hereinabove ("Coffee-Rich" in hard-frozen form or said hard-frozen product as thawed (not not powdered "Coffee-Rich"), "Rich's Whip Topping," "Sundi-Whip" and "Spoon n' Serve") is a "product resembling milk products" as that term is defined by section 38912 and each of plaintiffs' products referred to in Modified Finding of Fact number 14 set forth hereinabove ("Coffee-Rich" in hard-frozen form or said hard-frozen product as thawed (but not powdered "Coffee-Rich"), "Rich's Whip Topping," "Sundi-Whip" and "Spoon n' Serve") is subject to the provisions of Chapter 1250.

4. The decisions in *Whelan v. A. A. Brock,* Los Angeles Superior Court, No. 521 006 (1947), and *Rich Products of California, Inc. v. A. A. Brock,* Los Angeles Superior Court No. 597 020, have no res judicata effect as to any controverted issue in the present case.

5. A reasonable basis exists for exempting from the operation of Chapter 1250 products resembling milk products which are sterilized and packaged in hermetically sealed containers. Section 38903, subdivision (e) therefore constitutes a valid classification under the California and United States Constitutions.

6. Section 38904, which prohibits or restricts the use of products resembling milk products in charitable and penal institutions receiving assistance from the State, is neither reasonable nor in any way necessary to protect the health, safety and welfare of the people of California. Section 38904 is therefore invalid in that it violates both the California and United States Constitutions.

7. Section 35191, which requires that those who manufacture or import products resembling milk products for resale to retail outlets maintain certain records, protects the health, safety and welfare of the people of California. Section 35191 is therefore a valid exercise of the State's police power under the California and United States Constitutions.

8. The provisions of Article 4 of the Act, which include sections 38931 to 38937, relating to "plant licensing" are not applicable to plants for the manufacture of the subject products located outside the State of California.

9. Section 38941, which requires that any person engaged in the manufacture of products resembling milk products shall register such products with the Department, protects the health, safety and welfare of the people of California. Section 38941 is therefore a valid exercise of the State's police power under the California and United States Constitutions.

10. Section 471(b) of Title 3 of the California Administrative Code, which requires that the labels of trade products (filled products (sections 38913 and 38916) and non-dairy products (sections 38915 and 38916)) which resemble milk products contain the source of oil or fat and, if a blend, the source of oils or fats shall be in descending order of predominance and if an oil or fat has been hydrogenated, that fact shall be stated, protects the health, safety and welfare of the people of California. Section 471(b) of Title 3 of the



California Administrative Code is therefore a valid exercise of the State's police power under the California and United States Constitutions.

11. Section 38952, which requires that each container which contains a product resembling a milk product may be labeled with a fanciful or brand name only, protects the health, safety and welfare of the people of California and is not in conflict with 21 United States Code section 343(i). Section 38952 is therefore a valid exercise of the State's police power under the California and United States Constitutions.

12. Section 38956, which prohibits the containers and labels of trade products (filled products (sections 38913 and 38916) and nondairy products (sections 38915 and 38916)) from containing any combination of words, symbols, marks, designs, or representations commonly used or associated with the sale, advertising or distribution of milk products except those permitted by section 38954, protects the health, safety and welfare of the people of California. The term "commonly used or associated" when read in light of the rest of section 38956 and section 38954 is a sufficiently certain standard to determine what is permitted and prohibited by sections 38956 and 38954. Sections 38956 and 38954 are therefore a valid exercise of the State's police power under the California and United States Constitutions.

13. Section 61390, which prohibits the tying of products resembling milk products to the sale of a milk

product, any other product resembling a milk product or any other product handled by a distributor, protects the health, safety and welfare of the people of California. Section 61390 is therefore a valid exercise of the State's police power under the California and United States Constitutions.

14. Section 38905, which requires certain establishments serving meals to post signs or provide menu notices of specified minimum sizes stating "beverages and products which are not milk products are served here" does not tend to protect the health, safety and welfare of the people of California. Section 38905 is therefore invalid under the California and United States Constitutions.

15. Chapter 1250 and the regulations promulgated pursuant thereto do not place an unreasonable burden upon interstate commerce.

16. The unenforceable or invalid portions of Chapter 1250 described hereinbefore may be, and are, severed from said Chapter 1250, and those provisions upon which no Modified Findings of Fact or Modified Conclusions of Law have been made are not necessary to a decision herein and the parties are not entitled to any declaration thereon.

17. Plaintiffs, and each of them, are entitled to a declaration that none of the provisions heretofore concluded to be unconstitutional, invalid or inapplicable, may be applied against plaintiffs' products, and the Court so declares and enjoins the defendants, Jerry W.



Fielder, as Director of Agriculture of the State of California; R. L. Van Buren, as Chief of the Bureau of Dairy Service; and L. H. Lockhart, as Regional Administrator of the Bureau of Dairy Service and the Department of Agriculture of the State of California, and their agents, employees, successors and subordinates from enforcing or attempting to enforce said provisions of Statutes 1968, Chapter 1250.

18. Each party shall bear its own costs of suit herein.

Let judgment be entered accordingly.

DATED: Jan. 2, 1974.

/s/ S. L. Kurland
JUDGE OF THE SUPERIOR COURT

## APPENDIX E.

### Findings of Fact and Conclusions of Law.

FLINT & MAC KAY
Edwin Freston
Louis W. Myers, II
626 Wilshire Boulevard, 6th Floor
Los Angeles, California 90017
Telephone: 213/627-3114

ARNALL, GOLDEN & GREGORY
Ellis Arnall
Elliott Levitas
Fulton Federal Building, 10th Floor
Atlanta, Georgia 30303
Telephone: 404/577-5100
Attorneys for Plaintiffs

Superior Court of the State of Californa for the County of Los Angeles

Coffee-Rich, Inc., a Delaware corporation, and Rich Products Corporation, a Delaware corporation, Plaintiffs, vs. Richard Lyng, as Director of Agriculture of the State of California, et al, Defendants. No. 943 548.

Filed: Feb. 2, 1971.

The above entitled action came on regularly for trial on September 15, 1969, in Department 68 of the above entitled Court, the Honorable Samuel L. Kurland, Judge, presiding. Flint & MacKay by Edwin Freston and Louis W. Myers, II, and Arnall, Golden & Gregory of counsel by Ellis Arnall and Elliott H. Levitas appeared for plaintiffs. Thomas C. Lynch, Attorney General of the State of California, by Walter S. Rountree, Assistant Attorney General, and Walter E. Wunderlich

and John C. Hamilton, Deputy Attorneys General, appeared for the named defendants, plaintiffs having filed a dismissal as to all fictitiously named defendants. Evidence both oral and documentary was received to and including October 2, 1969, and thereafter the cause was submitted for decision, and being fully advised on the premises, the Court now makes the following:

## FINDINGS OF FACT

1. Plaintiffs, Coffee-Rich, Inc. and Rich Products Corporation, are corporations duly organized and existing under and by virtue of the laws of the State of Delaware with their principal places of business in Buffalo, New York and are duly qualified to do business in the State of California.

2. Jerry W. Fielder as the successor to Richard Lyng is the Director of Agriculture of the State of California. R. L. Van Buren is Chief of the Bureau of Dairy Service of the Department of Agriculture of the State of California. L. H. Lockhart is a Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California.

The individually named defendants were joined as parties in their official capacities and not otherwise.

3. The Court finds that there is a dispute and actual controversy as to the applicability of 1968 Statutes, Chapter 1250 (herein called Chapter 1250) and regulations thereunder to plaintiffs' products, "Coffee-Rich," "Rich's Whip Topping" and "Spoon n' Serve," and as to the constitutionality of Chapter 1250 and regulations thereunder as applied or threatened to be applied to plaintiffs' said products. This is a proper action and case for declaratory relief in respect thereof.



4. The production and distribution of products resembling milk products is a business affected with a public interest.

The prevention and avoidance of false, misleading and deceptive marketing of products resembling milk products, and the prevention of deception and confusion among consumers as to products resembling milk products, and the protection of the public health as to products resembling milk products, are each matters properly within the ambit of the state's police power.

5. There is an increasing advent into the market place of food products which, in appearance, taste and other physical characteristics, resemble milk products, which are or may be mistaken by consumers for milk and milk products, which are used for the same or similar purposes as milk and milk products, which are frequently manufactured, transported and sold in the same places as milk and milk products, which are frequently packaged in the same types, sizes and shapes of containers as milk and milk products.

6. Coffee-Rich is manufactured by Coffee-Rich, Inc., which is the owner of the trademark and trade name of "Coffee-Rich." Coffee-Rich, Inc. manufactures Coffee-Rich in the State of New York and sells it in interstate commerce to wholesale food distributors in California, and in the case of certain of the large grocery chains, Coffee-Rich is sold directly to the retailers in California. The wholesale distributors in turn sell Coffee-Rich to institutions such as restaurants, hospitals, schools and vending machine operators and to retail outlets.

Coffee-Rich is sold only in hard-frozen form, except for some Coffee-Rich which is sold to institutions in

powdered form. Coffee-Rich is sold by retail stores only in hard-frozen form.

7. Coffee-Rich is a non-dairy coffee whitening agent which serves the same functions that are served by milk products and other food products as an additive to coffee, tea or other hot beverages to whiten and cool them, and also to be used on cereals and fruit and in cooking, and is so advertised by plaintiff, Coffee-Rich, Inc.

8. Rich Products Corporation is the owner of the trademarks and trade names "Rich's Whip Topping," "Spoon n' Serve" and "Sundi-Whip" (hereinafter referred to as Rich Toppings) and of the United States Letters Patent under which the products are manufactured. Coffee-Rich is a developmental outgrowth of the subject of these patents. Rich Products Corporation manufactures the Rich Toppings named above in the State of New York and sells them in interstate commerce to wholesale food distributors in California. Wholesale distributors in turn sell Rich Toppings to retail outlets and to institutions such as restaurants, hospitals, schools, prisons, vending machine operators, etc. In the case of certain of the large grocery chains, the Rich Toppings are sold directly to the retailers in California. Rich Toppings are sold in frozen form.

9. Rich's Whip Topping is a hard-frozen manufactured vegetable whipping emulsion which is sold to the public at retail in aerosol or pressurized cans. The topping, after thawing, is emitted in aerated form for use as a whipped topping and filler for pies, cakes, puddings, desserts, beverages and other foods. Rich's Whip Topping is also sold for institutional use in non-pressurized containers which, after thawing, is mechan-



ically beaten or whipped into a topping for such foods. Sundi-Whip is the same product as Rich's Whip Topping and is sold by Rich Products Corporation to the institutional trade. Spoon n' Serve is a frozen pre-aerated vegetable whipped topping which is sold to the public at retail in molded plastic containers. It is applied by the consumer by spooning the pre-whipped topping from the container onto the food or beverage. Spoon n' Serve is a non-dairy topping for pies, cakes, puddings, desserts, beverages, and other foods. It is also used as a filler for pies, cakes, puddings, desserts and other foods.

10. A product known as "Rich's Whip Topping" was sold in California in 1946 and 1953. The product was the subject of two lawsuits: *B. C. Whelan v. A. A. Brock*, Los Angeles Superior Court, No. 521 006 (1947) and *Rich Products of California, Inc. v. A. A. Brock*, Los Angeles Superior Court, No. 597 020 (1953). As a result of *Whelan v. Brock, supra*, Rich's Whip Topping was held not to be an "imitation cream" as that term was defined in 1946 by Agricultural Code section 593. (Hereinafter, statutory references are to the Agricultural Code.) As a result of *Rich Products of California v. Brock, supra*, Rich's Whip Topping was held not to be an "imitation milk product" as that term was defined by section 651 as of January 2, 1953.

11. After 1947 section 593 was repealed. There is no definition of "imitation cream" in the current Agricultural Code.

After January 1953 section 651 was amended several times and repealed.

12. The said §38912 of the Agricultural Code is substantially different from the 1946 version of §593

and the 1952-53 version of §651. A substantial revision of the Agricultural Code occurred in 1968 (Stats. of 1968, c. 1250), and a new section was enacted, §38912 entitled, "Products resembling milk products," which reads:

> " 'Products resembling milk products' means any food product for human consumption, except those referred to in §38903, which has the appearance, taste, smell, texture or color of a milk product and which, taken as a whole, bears resemblance to a milk product, or could be mistaken for a milk product."

The foregoing section, enacted in 1968, replaced the 1967 statute (§38931) which referred to "imitation milk."

13. As of 1953 the products Coffee-Rich and Spoon n' Serve were neither sold nor distributed in California. Neither product was manufactured until approximately 1960 or thereafter.

14. The 1953 version of Rich's Whip Topping differed in color from the current version of that product. The ingredients of the current version of Rich's Whip Topping differ from the ingredients of both the 1946 and 1953 versions of the product then labeled "Rich's Whip Topping."

15. The appearance, taste, smell, texture and color of milk products vary from time to time and place to place depending upon the season of the year, the geographic location, the food eaten by the animal or animals producing the milk and the type of animal producing the milk. The appearance, taste, smell, texture and color of plaintiffs' products are uniform and standard at all times and in all places.



16. When compared to and alongside of milk products, plaintiffs' products have distinctive differences in appearance, taste, odor, color, and texture.

17. No milk product generally used for the same purposes as plaintiffs' products is sold as a powdered or frozen food product, and there is no prewhipped milk product used as a topping. Dairy whipped toppings cannot generally be successfully frozen after being aerated. Plaintiffs' toppings are specifically designed to be, and are, successfully frozen after being aerated.

In frozen form, plaintiffs' products possess shelf life significantly longer than milk products. Plaintiffs' products normally have a lower bacterial content and are less conducive to the growth of miscroorganisms than are milk products normally used for the same or similar purposes. The cost of plaintiffs' products is lower than the cost of milk products which are generally used for similar purposes.

18. Plaintiffs' packaged products sold at retail in stores are prominently labeled as non-dairy products. A true statement of the ingredients of the products is attached to and displayed on all containers in which they are packaged by the plaintiffs. Such labeling is not misleading or deceptive and informs the purchaser that each such product is non-dairy in nature. There is no showing of deception of the public in connection with the purchase of any such products. There is no showing of any false or misleading advertising in connection with the sale or distribution of the products, nor that any claim is being made that they are more nutritious than milk products. Plaintiffs' products are labeled in accordance with applicable federal law.

19. The products Rich's Whip Topping and Spoon n' Serve are used, and here ought to be used, as a topping for pastries and fruit and for the same or similar purposes as milk products. They are packaged in the same types, sizes and shapes of containers as milk and milk products.

20. When plaintiffs' products are sold in the original labeled package (or, in the case of "Coffee-Rich," when in powdered form), the products do not bear resemblance to any milk product nor could they be mistaken for any milk product.

21. When plaintiffs' products are served to the consumer or are served or sold by institutions (other than in powdered form), not in labeled containers which identify the product as a non-dairy product, each of said products, taken as a whole, could be mistaken for milk products, and are subject to the Act.

22. Liquid "Coffee-Rich" has substantially the same chemical composition, appearance, taste, smell, texture and color as certain non-dairy products which are sterilized and packaged in hermetically sealed containers and are exempted from the operation of Chapter 1250 by Section 38903(e) of the Agricultural Code. The exempted products are designed for and used for the same uses as plaintiffs' products in issue. The Court has examined samples of "Coffee-Rich" and of said hermetically sealed non-dairy sterile products and finds them indistinguishable. However, the Legislature had a reasonable basis for concluding that food products which are hermetically sealed and in a sterile condition would be less susceptible to the growth and multiplication of microorganisms than food products which are



not sterile or hermetically sealed, and therefore had a valid reason for establishing the exemption defined by that subdivision.

23. The provisions of the Act which require the manufacturer or importer of any "product resembling a milk product" to keep a record giving the quantity that is sold or purchased, and the name and location of the seller and purchaser, and the date and place to which it was shipped or delivered, shall apply only to a sale to a purchaser of the product upon a wholesale basis, or to a purchaser for resale to others or to any direct sales by the manufacturer to institutions; and so far as the law applies or purports to apply to sales to consumers at retail, it is an unreasonable burden upon commerce and a denial of equal protection of the laws and an improper and excessive exercise of the police power.

24. The provisions of Article 4 of the Act, which include sections 38931 to 38937, relating to "plant licensing" which apply or purport to apply to plants for the manufacture of the subject products outside of the State of California are an improper exercise of the police power of the state and are not reasonably related to the purposes of the Act, or any of them.

25. Article 5 of the Act which includes sections 38941 to 38943, and which provide for the registration of the product and of the labels, constitute a proper exercise of the police power of the state and conform to the stated purposes of the Act.

26. Section 38905 requires that certain establishments serving meals post signs or provide menu notices of specified minimum sizes stating "beverages and products which are not milk products are served here."

Said statement is ambiguous, is not reasonably calculated to inform the public, and is misleading and does not inform the public. A sign in size sufficient to comply with the statute would be so large as to be unreasonable and to constitute an unreasonable burden on the person required to exhibit the same. The required size of the alternative menu notice is likewise unreasonable. For each of the foregoing reasons, the Court finds that the sign and notice requirements as to plaintiffs' products each constitutes a denial of due process and equal protection of the laws and is discriminatory, unconstitutional and void.

27. Section 38904 prohibits the use of products resembling milk products in state penal or charitable institutions unless competing milk products are unavailable, and in private charitable institutions receiving assistance from the State of California the use of products resembling milk products is prohibited entirely. As to state penal institutions, said restriction is valid exercise of the state's power. There is not any constitutional basis or police power to discriminate against one class of products for the benefit of another as to charitable institutions, particularly when the regulation is in the form of prohibition. Said limitations on such use in charitable institutions are invalid.

28. Section 38952 requires that labels may show fanciful or brand names only and prohibits a generic description of the product. No food product, other than those described in Chapter 1250, is subject to such limitation; labels of all other foods are required under California law and all foods under federal law to state the common or ordinary name of the product, if any. Said requirement and said section are invalid, in that it has no reasonable relationship to the health or welfare and separately requires a violation of federal statutes and regulations thereunder.



29. Section 38956 prohibits manufacturers of trade products from using labels and advertising commonly used or associated with the sale, advertising or distribution of milk products. Said proscription as to what is "commonly associated" with the sale, etc. of milk products is a vague, uncertain and ambiguous term which leaves persons subject to such requirement with no basis for determining what is unlawful, and said section is therefore invalid insofar as the words "or associated," are employed.

30. Although Chapter 6 and the regulations issued pursuant to it affect interstate commerce, they do so indirectly, and only as an incidental effect of their primary purposes.

31. With reference to sections 38902(b), 28924, 38952, 38955, 38972, 38982, 38983, and 38984, and specifically with reference to the grant of authority to the Director of Agriculture to promulgate regulations in terms of the entirety of Chapter 6, as well as in terms of the above-named sections themselves, the standards by which the Director is to be guided are sufficiently stated and restricted in scope.

32. With specific reference to section 471(b) of the regulations, the requirement that labels of trade products which resemble milk products contain the source of the oils or fats in descending order of predominance, and that if an oil or fat as been hydrogenated, that that fact shall be stated, such regulation is a valid exercise of the police power since the public has a right to know the nature of the food products it consumes, and section 471(b) promotes one or more of

the Legislature's stated purposes of the Act, and is authorized by sections 38902(b) and 38952 of the Act, if the Director determines the same to be in the public interest.

33. By enacting section 38907, the Legislature intended that if any article, section subdivision, sentence or clause of any provision of Chapter 6 is for any reason adjudged unconstitutional or unenforceable, such decision does not affect the validity of the remaining provisions of Chapter 6. In enacting section 38907, the Legislature declared that it would have enacted all provisions of Chapter 6 irrespective of the fact that one or more of such provisions were adjudged unconstitutional or unenforceable.

34. Section 61390 which prohibits the tying of a product resembling a milk product to the sale of a milk product but does not prohibit the converse thereof denies plaintiffs equal protection and is invalid.

35. Any paragraph or any portion of a paragraph hereinafter stated as a Conclusion of Law, which should more appropriately be stated as a Finding of Fact, the same is hereby declared to be a Finding of Fact and is hereby incorporated herein by reference.

## CONCLUSIONS OF LAW

1. Any paragraph or any portion of a paragraph heretofore stated as a Finding of Fact, which should more appropriately be stated as a Conclusion of Law, the same is hereby declared to be a Conclusion of Law and is hereby incorporated herein by reference.

2. Food products are a basic subject matter for regulation in the interest of the public health, safety and welfare, and the subject matter of Chapter 1250



is therefore within the police power of the State of California. The state has a right to insure the health and safety of the public and their right to know what they are consuming by labeling requirements reasonable in character and designed to promote the end sought within constitutional limits.

3. The decisions in *Whelan v. A. A. Brock*, Los Angeles Superior Court, No. 521 006 (1947), and *Rich Products of California, Inc. v. A. A. Brock*, Los Angeles Superior Court, No. 597 020, have no res judicata effect as to any controverted issue in the present case.

4. Each of plaintiffs' products referred to in these Findings, when ready for consumption, is a "product resembling milk products" as that term is defined in section 38912; when such products are in the original containers the public is informed adequately that such products are not dairy products or milk products.

5. Insofar as section 38904 forbids the use of products resembling milk products in charitable institutions receiving state assistance, it is void because it violates both the California and United States Constitutions.

6. Insofar as section 38905 requires that no product resembling milk products may be placed before a patron or employee for use as food unless there is displayed in a prominent place in each room where the meals are served a sign which bears the words "beverages and products which are not milk products are served here," in blackfaced letters of not less than four inches in height upon a white background, or unless the words are printed on a menu which is furnished to such patrons or employees, in legible type, no smaller

than that which is used to describe other food items on the menu, and upon the same portion of the menu where other food items are described, section 38905 is void and of no effect because it violates both the California and United States Constitutions, and is ambiguous and misleading.

7. Insofar as section 38952 requires that no container of products resembling dairy products may be labeled with other than a fanciful or brand name, section 38952 is void and of no effect because it violates both the California and United States Constitutions, and applicable federal statutes.

8. The provisions of the Act which require the manufacturer or importer of any "product resembling a milk product" to keep a record giving the quantity that is sold or purchased, and the name and location of the seller and purchaser, and the date and place to which it was shipped or delivered, shall apply only to a sale to a purchaser of the product upon a wholesale basis, or to a purchaser for resale to others or to any direct sales by the manufacturer to institutions; and so far as the law applies or purports to apply to sales to consumers at retail, it is an unreasonable burden upon commerce and a denial of equal protection of the laws and an improper and excessive exercise of the police power.

9. The provisions of Article 4 of the Act, which include sections 38931 to 38937, relating to "plant licensing" which apply or purport to apply to plants for the manufacture of the subject products outside of the State of California are an improper exercise of the police power of the state and are not reasonably related to the purposes of the Act, or any of them.



10. The regulations heretofore issued pursuant to Chapter 6 and contained in Article 9, Title 3, of the California Administrative Code, as sections 468 to 476, inclusive, insofar as they require the source of fats or oils in "non-dairy products" as defined in Chapter 1250 to be listed on the labels of such products in the descending order of predominance and to state if the oil or fat has been hydrogenated are within the authority and jurisdiction of the Director of Agriculture, and were properly issued pursuant to applicable law. They were issued pursuant to a valid delegation of authority by the Legislature to the Director of Agriculture.

11. The unenforceable or void portions of Chapter 6, or any regulations pursuant thereto, described hereinbefore may be, and are, severed from that chapter, and those provisions upon which no Findings of Fact or Conclusions of Law have been made are not necessary to a decision herein and the parties are not entitled to any declaration thereon.

12. Plaintiffs, and each of them, are entitled to a declaration that none of the provisions or regulations, heretofore concluded to be unconstitutional and/or void, may be constitutionally applied against plaintiffs' products, and the Court so declares and enjoins the defendants, Jerry W. Fielder, as Director of Agriculture of the State of California, R. L. Van Buren as Chief of the Bureau of Dairy Service, and L. H. Lockhart as Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California, and their agents, employees, and subordinates from enforcing or attempting to enforce said provisions of Statutes 1968, Chapter 1250.

13. The preliminary injunction made in the above-entitled case dated December 9, 1968, as amended on January 20, 1969, restraining the defendants above-named, and their agents, employees, and subordinates from enforcing or attempting to enforce the provisions of Statutes 1968, Chapter 1250, with respect to plaintiffs' said products shall remain in full force and effect until such time as the Judgment entered pursuant to these Findings shall become final, or by the appropriate Order of an Appellate Court, at which time said preliminary injunction shall be dissolved.

14. Plaintiffs are entitled to judgment against the defendants, and each of them, for their costs of suit herein.

Let judgment be entered accordingly.

DATED: February 2, 1971.

/s/ Samuel L. Kurland,
Samuel L. Kurland, Judge

## APPENDIX F.

### Declaration of Edwin Freston.

### Appendices to Opening Brief in California Court of Appeal in Coffee-Rich II

I, Edwin Freston, declare:

1. I am an attorney at law admitted to practice in the State of California, and I am a member of Argue, Freston & Myers, attorneys for plaintiffs herein.

2. On December 3, 4 and 5, 1974 I examined the record in *Tip Top Foods, Inc. v. Lyng,* Alameda Superior Court, number 386846, subsequently 1st Civ. 30639. The trial of that case commenced November 25, 1970 and the taking of testimony concluded December 7, 1970. Judgment was entered May 11, 1971.

3. Appended to this Brief are true and correct copies of portions of the record of *Tip Top* as follows:

*Appendix B*—Findings of Fact and Conclusions of Law, filed May 3, 1971.

*Appendix C*—Excerpts from the Reporter's Transcript.

*Appendix D*—Exhibit 2 in evidence.

4. This Court is requested to take judicial notice of the contents of appendices B, C and D for the purpose of establishing that comparison tests were used in connection with the *Tip Top* case and the products in issue therein. Plaintiffs herein were unaware of comparison tests used in *Tip Top* until discovery thereof through communication with Tip Top's counsel on November 27, 1974.

I declare under penalty of perjury that the foregoing is true and correct.

Executed December 9, 1974, at Los Angeles, California.

/s/ Edwin Freston

**Findings of Fact and Conclusions of Law.**

WATSON, HOFFE & FANNIN
3700 Barrett Avenue
Richmond, California 94805
237-3700
Attorneys for Plaintiff

In the Superior Court of the State of California, in and for the County of Alameda.

Tip Top Foods, Inc., a corporation, Plaintiff, vs. Richard Lyng, et al., Defendants. No. 386846.

FILED: May 3, 1971, Jack G. Blue, County Clerk, By Rosalynn Kennon, Deputy Clerk.

The above-entitled action came on regularly for trial on November 25, 1970, in Department No. 20 of the above-entitled court, the Honorable Robert H. Kroninger, Judge, presiding. Watson, Hoffe & Fannin by Francis A. Watson, Jr. and John R. Pierce appeared for plaintiff. Thomas C. Lynch, Attorney General of the State of California, by Roderick Walston, Deputy Attorney General, appeared for the defendants. Evidence, both oral and documentary was received to and including December 7, 1970, and thereafter the cause was submitted for decision; and being fully advised in the premises, the court now makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

### I

Plaintiff, Tip Top Foods, Inc., is a corporation duly organized, authorized to do and doing business in the State of California, with its principal place of business in the City of Oakland, County of Alameda, State of California.



### II

Jerry W. Fielder is successor to defendant Richard Lyng as the Director of Agriculture of the State of California. Defendant R. L. Van Buren is Chief of the Bureau of Dairy Service of the Department of Agriculture of the State of California. P. J. Benedetti is a Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California, whose regional territory includes plaintiff's place of business. Said individually named defendants were sued in their official capacities.

### III

The Legislature of the State of California, in its 1968 Regular Session enacted a detailed and comprehensive scheme of legislation designed to regulate the manufacturing, distribution and sale of products described therein as "products resembling milk products". Said legislation was approved by the Governor and became Chapter 1250 of the Statutes of 1968 and, said legislation, together with subsequent amendments thereto, are hereinafter referred to as Chapter 1250. Said Chapter 1250 added a new Chapter 6 (commencing with §38901) to Part 3 of Division 15 of the Agricultural Code, entitled "Products Resembling Milk Products" and added and amended various other provisions in said code, relating to products resembling milk products. References hereinafter to code sections unless otherwise specified are to sections of said Agricultural Code.

### IV

Products resembling milk products, the manufacture, distribution and sale of which are regulated by Chapter 1250 are defined in §38912.

V

There is a dispute and actual controversy as to the applicability of Chapter 1250 and the regulations promulgated pursuant thereto to plaintiff's products hereinafter described, and as to the constitutionality of Chapter 1250 and the regulations promulgated pursuant thereto as applied or threatened to be applied to plaintiff's said products. Plaintiff will be irreparably injured and will be denied its constitutional rights of due process of law and equal protection of the law if certain provisions hereinafter mentioned are enforced against it. This is a proper action and case for injunctive and declaratory relief.

VI

Plaintiff at its plant in Oakland, California, manufactures three products, "Sour C", "Hi-Lo", and "Pantry Pride". "Sour C" and "Hi-Lo" are similar except for their fat contents. The fat content of "Sour C" is approximately 18% and the fat content of "Hi-Lo" is approximately 16%. Each of plaintiff's products "Sour C" and "Hi-Lo" is a pasteurized, homogenized blend of non fat dry milk solids, partially hydrogenated vegetable oil derived from soy bean, water, and minor amounts of emulsifiers and stabilizers derived from vegetable sources. "Pantry Pride" is a fluid product, being a pasteurized, homogenized blend of non fat dry milk solids, approximately 3.5% wholly hydrogenated vegetable fat derived from coconuts, water and minor amounts of emulsifiers and stabilizers derived from vegetable sources.

VII

"Sour C", "Hi-Lo" and "Pantry Pride" are sold by plaintiff to numerous commercial or institutional users



such as restaurants and food manufacturers. Plaintiff's said products are also sold to numerous wholesale food distributors who in turn sell said products to numerous commercial or institutional users and, in the case of "Sour C", to numerous retail stores. Only "Sour C" is sold to the public in retail stores in which case it is packaged in one pound containers, the labels of which contain the name "Sour C", a description of the ingredients of the product, a description of the product's uses, and the name and location of its manufacturer. The label also indicates that the vegetable oil used in the product is hydrogenated, but does not indicate the vegetable from which the oil is derived. "Hi-Lo" and "Pantry Pride" are not sold to the public in retail stores. The commercial or institutional users of plaintiff's products "Sour C" and "Hi-Lo" employ said products as dressings for foods such as baked potatoes, and as ingredients in the preparation of other foods such as salad dressings and beef stroganoff. Plaintiff's product "Pantry Pride" does not reach and is not consumed by the public in its original form. It is sold to commercial or institutional users for cooking and baking other food products.

VIII

Plaintiff's said products are prominently and honestly labeled in such a manner that a true and prominent statement of the ingredients and composition of the products is attached and displayed on all containers in which they are vended. Only the label of "Pantry Pride" designates the source of the vegetable fat.

IX

There is no misleading or deception of the public by plaintiff in the distribution and sale of its said

products, nor has there been any false or misleading advertising or promotion by plaintiff in connection with the sale or distribution of its said products.

X

Plaintiff's said products are wholesome and nutritious.

XI

Each of plaintiff's products is the result of plaintiff's development and experimentation with the intent of developing new, better and distinctive food products.

XII

The color, flavor, chemical composition and other properties and characteristics of milk products vary from time to time and from place to place, depending upon the season of the year, the geographic location, the food eaten by the animals producing the milk, the breed of the animal producing the milk, and upon other factors. The color, flavor, chemical composition and other properties and characteristics of plaintiff's said products are more uniform and standard.

XIII

There is a demand for plaintiff's products in preference to competing milk products by some of its users.

XIV

In the case of "Sour C" for approximately seven years, in the case of "Hi-Lo" for approximately six years, and in the case of "Pantry Pride" for more than two years, plaintiff has manufactured and sold its said products and has conducted a program of sales promotion and education among commercial or institutional users and the public, and has expended substantial sums in developing a market for its said products.



XV

The determination of whether a product is a product resembling a milk product within the scope of regulation of Chapter 1250 is determined solely on the basis of the criteria set forth in §38912 of the Agricultural Code. Some characteristics of the plaintiff's products are different from those of milk products, such as the products' shelf life and melting points and, of course, their actual chemical ingredients. However, it is doubtful whether the consumer would be able to observe these characteristics when purchasing the products, and hence such characteristics are of little importance in determining whether plaintiff's products are "products resembling "milk products" within the meaning of §38912 of the Agricultural Code.

XVI

The textures, colors, odors and tastes of plaintiff's products "Pantry Pride", "Sour C", and "Hi-Lo" are not materially different from the corresponding characteristics of competing milk products, and each, taken as a whole, bears resemblance to a milk product, or could be mistaken for a milk product and is a product resembling a milk product within the meaning of §38912 of the Agricultural Code.

XVII

Plaintiff's said products are "filled products" as defined by §38913 of the Agricultural Code.

XVIII

Plaintiff's said products are "trade products" as defined by §38916 of the Agricultural Code.

XIX

§35191 of the Agricultural Code as amended by Chapter 1250 requires that manufacturers or importers of products resembling milk products keep records concerning the quantity of products resembling milk products sold or purchased, the names and locations of the sellers and purchasers, and the dates and places to which said products are shipped or delivered. Said section denies plaintiff its constitutional rights in that as applied to plaintiff, this section denies plaintiffs rights of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and in violation of Article I, Sections 1, 11, 13 and 21, and Article IV, Section 16 of the Constitution of the State of California.

XX

§38904 of the Agricultural Code as enacted by Chapter 1250 prohibits the use of products resembling milk products in any of the charitable or penal institutions that receive assistance from the state unless competing milk products are unavailable, in which case, products resembling milk products may be used in state institutions only. This section is discriminatory against plaintiff and denies plaintiff its constitutional rights. As applied to plaintiff, the section denies plaintiff rights of property without due process of law, and denies plaintiff equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States, and in violation of Article I, Sections 1, 11, 13 and 21, and Article IV, Section 16 of the Constitution of the State of California.



XXI

§38905 of the Agricultural Code as enacted by Chapter 1250 requires that certain establishments serving, for use as food, any product resembling milk products post signs or provide menu notices of specified minimum sizes stating "Beverages and products which are not milk products are served here". Said section is unconstitutional, and defendants have stipulated that in its present form it is unreasonable and should not be enforced.

XXII

§38952 of the Agricultural Code as enacted by Chapter 1250 requires that labels of products resembling milk products other than imitation products as defined in §38914 be labeled with a fanciful or brand name only, that the list of ingredients of a "filled product" as defined in §38913 shall contain the statement that the product is a "filled product" and that the list of ingredients in a "non dairy product" as defined in §38915 shall contain the statement that the products is a "non dairy product". Labels of all other foods are required under state and federal law to be described by their common or ordinary names, if any. Said requirements of §38952 deny plaintiff its constitutional rights in that as applied to plaintiff, the requirements deny plaintiff rights of property without due process of law, and deny plaintiff equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States, and in violation of Article I, Sections 1, 11, 13 and 21, and Article IV, Section 16 of the Constitution of the State of California.

XXIII

§38956 of the Agricultural Code as enacted by Chapter 1250 prohibits manufacturers of "trade products" as defined by §38916 from using labels containing any combination of words, symbols, marks, designs, or representations commonly used or associated with the sale, advertising or distribution of milk products, and further prohibits, with certain exceptions, any statement regarding milk products. §38956 denies plaintiff its constitutional rights in that as applied to plaintiff, the section denies plaintiff rights of property without due process of law, and denies plaintiff equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States, and in violation of Article I, Sections 1, 11, 13 and 21, and Article IV, Section 16 of the Constitution of the State of California. Furthermore, said section, because it is so vague and uncertain with respect to what is "commonly associated" with the sale, advertising or distribution of milk products is unenforceable.

XXIV

By enacting §38907, the Legislature intended that if any article, subdivision, sentence or clause of any provision of Chapter 6 of Part 3 of Division 15 as enacted by Chapter 1250 is for any reason adjudged unconstitutional or unenforceable, such decision does not affect the validity of the remaining provisions of Chapter 6. By enactment of §38907 the Legislature declared that it would have enacted all of the provisions of Chapter 6 irrespective of the fact that one or more of such provisions were adjudged unconstitutional or unenforceable.



## CONCLUSIONS OF LAW

I

Each of plaintiff's products "Sour C", "Hi-Lo" and "Pantry Pride" is a "product resembling a milk product" as that term is defined in §38912.

II

§35191 of the Agricultural Code to the extent that it requires manufacturers or importers of products resembling milk products to keep records concerning the quantity of products resembling milk products sold or purchased, the names and locations of the sellers and purchasers of such products, and the dates and places to which such products are shipped or delivered is void because it violates both the California and United States constitutions.

III

§38904 of the Agricultural Code insofar as it prohibits the use of products resembling milk products in any of the charitable or penal institutions that receive assistance from the state is void because it violates both the California and United States constitutions.

IV

§38905 of the Agricultural Code insofar as it requires that certain establishments serving products resembling milk products for food purposes to post signs or provide menu notices of specified minimum sizes stating "Beverages and products which are not milk products are served here" is void because it violates both the California and United States constitutions.

V

§38952 of the Agricultural Code insofar as it requires that labels of products resembling milk products other than imitation products defined in §38914 of the Agricultural Code be labeled with a fanciful or brand name only, that the list of ingredients of a "filled product" as defined in §38913 shall contain the statement that the product is a "filled product", and that the list of ingredients of a "non dairy product" as defined in §38915 shall contain the statement that the product is a "non dairy product" is void because it violates both the California and United States constitutions.

VI

§38956 of the Agricultural Code insofar as it prohibits manufacturers of "trade products" as defined by §38916 from using labels containing any combination of words, symbols, marks, designs, or representations commonly used or associated with the sale, advertising, or distribution of milk products, and further prohibiting, with certain exceptions, any statements regarding milk products, is void because it violates both the California and United States constitutions and is vague, uncertain and ambiguous.

VII

The unenforceable or void portions of Chapter 6 of Part 3 of Division 15 of the Agricultural Code and any regulations pursuant thereto hereinabove described may be, and are, severed from that chapter, and those provisions upon which no Findings of Fact or Conclusions of Law have been made are not necessary to a decision herein and the parties are not entitled to any declaration thereon.



VIII

Plaintiff is entitled to a declaration that none of the provisions heretofore concluded to be unconstitutional or void may be constitutionally applied against plaintiff's products, "Sour C", "Hi-Lo" and "Pantry Pride", and the court so declares and enjoins the defendants, Jerry W. Fielder as Director of Agriculture of the State of California, R. L. Van Buren as Chief of the Bureau of Dairy Service, and P. J. Benedetti as a Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California, and their agents, employees, subordinates, and successors from enforcing or attempting to enforce said provisions of Chapter 1250.

IX

Plaintiff is entitled to a judgment against defendants, and each of them, for its costs of suit herein. Let judgment be entered accordingly.

Dated: May 3, 1971.

/s/ Robert H. Kroninger
Judge of the Superior Court

**Excerpts From Reporter's Transcript on Appeal in Tip Top Foods, Inc. v. Lyng, 1st Civ. 30639.**

[30]* Q. [By Mr. Watson, counsel for plaintiff]: Now, going back for a minute: You contended that this is a product that resembles a dairy product; that Sour C is a product that resembles a dairy product, is that correct?

[31] A. [Mr. Van Buren] Yes.

Q. All right. Now, taken as a whole, are you saying that that product resembles a dairy product?

A. You're taking the product per se?

Q. As a whole. I'm asking you if that resembles a dairy product.

A. Yes, to the best of my knowledge, it does.

Q. It's clearly labeled that it's an all purpose dressing, is it not?

A. Yes.

Q. Now, have you made any tests yourself to determine whether or not this product resembles a dairy product?

A. We have had knowledge of the product for several years, you can appreciate that. Before the advent of 1250, yes, we have made them.

Q. Have you made any tests since the advent of 1250 to determine whether or not this product resembles a dairy product?

A. Yes.

Q. Specifically what tests have you made?

A. On or about, as I recall, October the 10th, last year, we put a series of nine samples of a product of a —eight, I believe,—of a similar nature and three beverages. These blind samples were submitted to two experienced judges who evaluated them in terms of their experience in dealing with dairy products over a period of years to determine whether or not we could, in the blind, segregate dairy products and products resembling milk products of a like nature.

Q. Now, who conducted those tests?

A. You mean who evaluated the products in the blind? [32]

Q. Who was in charge of those tests?

A. The eight cultured products in the original package form were given to Mr. C. L. Stucker, Dairy Microbiologist. He was requested to set up eight samples in the blind where there was no knowledge of what the product was other than that which was available visually and through the senses. We, both Mr. P. J. Dolan, Regional Sacramento Administrator, and I, chose to undergo tests, and the samples as submitted to us had no identity other than numbers. We had no knowledge of whether Mr. Stucker had given us eight dairy products or eight products resembling milk products or a co-mingling of both.

In the case of beverages, three beverages, we had no knowledge of whether there were three beverages resembling milk products or three milk products or a co-mingling of the two. It was in the blind.

Q. You're assuming in your testimony, for these tests that the products were products resembling milk products?

A. We're not assuming anything. We were taking them blind.

Q. But you're labeling them in the tests "Products Resembling Milk Products" or "Dairy Products"?

A. As submitted in the blind they had nothing but a number on them.

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*Numerals in brackets refer to pages of the Reporter's Transcript on Appeal.

MR. WATSON: Your Honor, I don't want to be nit picking. I want to get material in that is inadmissible by way of assumption that these are products that resembled dairy products. During their testing they have taken any product that is not a dairy product, I believe, and called it a product resembling a milk product and in their testing listed [33] it as a dairy product or a product resembling a milk product.

THE COURT: I don't believe that was his testimony, as I understand it.

MR. WATSON: Well, that is what I am trying to develop.

Q. Mr. Van Buren, as a matter of fact, when you made the test and the test results, you have categorized the two kinds of products as either a dairy product or a product resembling a milk product, have you not?

A. Yes. It's a matter of semantics, I believe. I indicated earlier utilizing the word product, products resembling milk products as done in 1250.

MR. WATSON: That's my point. I don't want to have his language that we're using here termed as meaning there has been a conclusion that the particular item was a product resembling a dairy product. Mr. Van Buren is using this in a broad sense to distinguish it from a product used as a dairy product.

THE COURT: I'm not sure I understand your concern. I haven't heard him characterize anything that he sampled yet. He told us he didn't know what these products were. If you get to it, he is probably going to tell us what their conclusions were and if he says that some of them in his blind testing he felt resembled dairy products that weren't, I don't know of any law that can prevent his saying that.



MR. WATSON: Q. Mr. Van Buren, among the samples did you include Sour C? A. Yes.

Q. Do you know what other products were included along with the Sour C among the samples? [34]

A. May I refer to my notes?

Q. Certainly.

A. Essentially, what you have there, the "Hi-Lo" brand dressing; "Tuttle" brand sour cream dressing; "Borden" brand chive sour cream dressing; "Carnation" brand imitation sour cream; "Berkeley Farms" brand sour cream; "Tuttle" brand sour cream; "Carnation" brand sour cream; "Tip Top" brand Sour C dressing.

MR. WATSON: Counsel, did you furnish us with that half of the chart or not?

MR. WALSTON: [Deputy Attorney General]: It might be helpful if counsel looks at the notes the witness is referring to.

MR. WATSON: My question relates to another matter that we may get to. In our discovery we asked repeatedly and finally got the State's test, and we apparently were only furnished with one page.

MR. WALSTON: This was subsequently prepared just for purposes of this trial.

MR. WATSON: Do you happen to have an extra photocopy, counsel?

MR. WALTSON: I think so.

Is this the only copy you have available?

THE WITNESS: It's the only copy I have with me. I do have it in my briefcase.

THE COURT: You can make copies. There are copying machines in the building. You can have copies made during the recess if you like.

MR. WATSON: Maybe you can save me some of the trouble and we won't have to make a copy. [35]

Is this one dated October 10, 1969 the same that you people furnished us except you added a whole column?

THE WITNESS: Except we placed the commercial brand in relationship to the initial identification using the segregation.

THE COURT: Would you like to take the recess before we start?

MR. WATSON: I would like to. This is a fairly complicated test and we got all but the correlates.

THE COURT: Yes. You might want to go over that during the recess. Do you want that marked?

MR. WATSON: Might that be marked and might I look at that during the recess?

THE COURT: Yes. Let it take Plaintiff's 2 for identification. And counsel will be permitted to withdraw it during the noon recess to make copies.

(Sampling report marked Plaintiff's Exhibit No. 2 for identification only.)

THE WITNESS: I have additional copies in my briefcase. If you like, I'll be happy to furnish you with additional copies.

THE COURT: Perhaps counsel can get a copy now.

Let me say, since this is expected to be a lengthy trial, ordinarily we can reconvene in the afternoon at any hour you like, and if counsel from out of county don't care to take the usual two hour recess because you can't make much utilization of the time in going to your office, we can plan on reconvening before 2:00 most of the time. Today I have to go to a meeting * * *.



[102] R. L. VAN BUREN

resumes the stand and testifies further as follows:

CROSS-EXAMINATION (RESUMED)

BY MR. WATSON: Q. Mr. Van Buren, there are two products here; this one is labeled Sour C and this one is labeled Valley Gold Sour Cream Grade A. Do you see the two products?

A. Yes.

Q. I'm going to ask you some other questions later, very shortly, concerning them but I first of all want to do something with them. I'd like to put one on one potato and one on the other potato. I'm taking the sour cream and I'm putting it on the potato that is on Your Honor's right. I'll first ask the Court—

MR. WALSTON: When were these products purchased?

MR. WATSON: Yesterday—and I'll ask Your Honor to look at these in the container also. I'm going to have other questions concerning the product.

Now, if the Court please, I would also call the Court's attention to the fact that the Sour C container top has a date on the front of it which says 12-18.

Q. Now, Mr. Van Buren, do you know what that 12-18 means?

A. No. It could be a pull date or it would be the date of manufacture. It could be anything else.

Q. Don't you believe it to be either the pull date or the date of manufacture? A. Those two are commonly used. It could be anything. It's more apt to be one of the two.

Q. And the bottom of the Valley Gold container is 12-07? [103]

A. Mm-hm.

Q. Which, in your experience, would be either a pull date or a manufacturing date, would that be true?

A. Yes.

MR. WALSTON: On voir dire, what makes what a pull date?

MR. WATSON: I'll ask him.

Q. Mr. Van Buren, the pull date is the date the manufacturer wants the products removed from the shelf because the shelf life has in the manufacturer's recommendations ceased to be good for the consumer, is that correct?

A. It reflects the manufacturer's belief that the product will deteriorate to the point where it would be objectionable to the consumer possibly.

Q. Some manufacturers put a code that the public couldn't figure out, isn't that true, on the bottom for a pull date?

A. Yes, some used to.

Q. Code, letters and numbers that only the manufacturer and the store people know, am I correct?

A. Yes, codes are used.

Q. Now, I'd like to ask the Court if it observes here these things are still warm; and Mr. Van Buren, I'll ask you, do you note any difference in the two products insofar as their behavior on the potatoes with respect to the melting characteristics? A. I myself have the unusual advantage. If I'm looking at this as a consumer, rarely do they get a chance to see it as a comparative. They see it singularly.

Q. I understand that. You're talking about them as they resemble milk products, and I'm asking you if there is not a [104] difference in the melting qualities of these two products?



A. This product appears to stand up a little better. It may be the level of the emulsifier. I don't know.

Q. You're pointing to Sour C? A. Yes.

Q. And what you're saying is that Sour C does appear to stand up better and not melt as rapidly on a baked potato as sour cream? A. I'm saying that this particular product I'm looking at. I can't categorize as to what Sour C was or will be.

Q. For the record, between these two products today on this potato which I baked in the courtroom, the Sour C appears to be standing up better and not melting as fast as the sour cream sample? A. It's retaining its form. Let's say that.

MR. WATSON: Your Honor, do you care to make an observation for the record as to what you visually have observed? It is my belief that in reading of the other cases that the courts have made observations, particularly the Aeration Processes case. If not, I'll leave it with the testimony.

THE COURT: I think Mr. Van Buren has stated it fairly, that the Sour C appears to be retaining its original form more rigidly that the sour cream.

THE WITNESS: May I—

MR. WATSON: Q. Certainly. The date is on the top.

A. The date of what?

Q. Well, we'll establish that that is the pull date, not the date of manufacture. The date isn't even here yet. Neither date is here yet. One date is December 7th and one date is [105] December 1t8h. A. We don't know whether this is the pull date or date of manufacture. I don't know the background or history or the age of either product. They each have a date and neither one of those dates could possibly be the date

of manufacture. You would agree to that, since today is November 30th, I hope?

MR. WALSTON: Counsel is arguing with the witness and I object.

THE COURT: I don't know what the question is.

MR. WATSON: I'm not arguing with the witness. I believe Mr. Van Buren asked me to indicate something with the sample and I pointed out what the dates were.

THE COURT: Do you have other questions?

MR. WATSON: Yes. I would like to get these out of the Court's way, if I may, unless you would like them to stay here for further observation during the rest of the discussion?

THE COURT: No, no, no need for that. I think I would, as long as you have the products here, like to taste them.

MR. WATSON: I think you might as well taste them now, because they did come out of our office refrigerator as we left for court at five after 9:00 and it's been a few hours.

THE COURT: Did you want somebody else to taste them? Let me use the fork and I'll taste each product from the spoon and if anyone else wants to test them, they may.

(Both products are tasted by the Court.)

THE COURT: Well, I would, for the record, say that I think that their taste is quite similar, and in texture fairly close. [106]

MR. WATSON: Am I permitted to question the Court?

THE COURT: Oh, yes.

MR. WATSON: By texture, I take it you note that the Sour C at least appears to be much more stable?



THE COURT: Yes. That was why I didn't say "similar". I intended to imply by that that their texture is not as much alike as was the taste.

MR. WATSON: If the Court please, if you tip the Sour C sideways, nothing happens in the container; and if you tip the—I'm not going to get the sour cream up to a vertical because it's going to pour out of the package, I think you will recognize that?

THE COURT: Yes.

MR. WALSTON: Did the Court make any observations with respect to color?

THE COURT: No, I didn't, but I would say that the color is similar, very close.

MR. WATSON: Does the Court know that the sour cream has a more yellow cast to it than the Sour C, which is more white in color?

THE COURT: Yes, slightly.

MR. WATSON: Q. Mr. Van Buren, would you care to taste either of these two products? A. No.

MR. WATSON: Unless the Court desires something else as to questions of the witness with respect to these two samples, I do not intend to ask the witness any further questions with regard to these two products we brought here today.

Might I ask the Court, I don't know if there are any [107] refrigeration facilities here, but do you desire that these two products be kept for any period of time during the course of this trial to observe whether any changes in the two products, either in odor, taste or otherwise, takes place? Otherwise I can take them back to our office at the end of the day and put them in the refrigerator and bring them at the end of the trial.

THE COURT: I don't think there is any need for that, unless either side would contend the present ap-

pearance of either of these products is not its normal appearance when presented to the public.

MR. WALSTON: We wouldn't contend that. Furthermore, it would be irrelevant to consider the state of these two products other than the time when they are ingested, because the statutory criteria is the appearance, color, smell and texture.

THE COURT: At the time they are normally offered they would be relevant. That's why I asked the question if both sides agree.

MR. WALSTON: May I ask one other question on voir dire?

Would the Court care to make any other observations with respect to smell? The reason I ask, that characteristic is specifically mentioned in the statutes.

(The Court smells both products.)

THE COURT: That's quite similar too. I will say that the Sour C smells more like I would expect sour cream to smell than this particular sample of sour cream does.

MR. WATSON: In other words, you think Sour C has a [108] distinctive odor?

THE COURT: They are distinguishable, I think. That is, the Sour C is more pronounced, more discernible.

MR. WATSON: I'm not a witness but I would have to say the Sour C odor is more pronounced. The only reason for asking if you want us to keep the product, it is our contention, it may be even an admission I could elicit from Mr. Van Buren, one of our claims is the fact the shelf life of the Sour C is longer than the shelf life of competing sour cream products. And I think in trial there will be a different appearance to each of these products than there is now. Ours would vary



very little, and the sour cream would change in color and in taste.

THE COURT: What would be the relevance of that?

MR. WATSON: Not only the similarities of the products in the statute, but I think you have to take the products as a whole, their differences, you call it lasting quality of Sour C, we call it self life, are substantially longer than the competing dairy products. Up to 30 days for Sour C, sometimes as short as 8 to 12 days for sour cream.

THE COURT: I don't see the relevance of that, though. It's the effect or impact on the consuming public that presumably was the motivation of this legislation. At least that's what the defense relies on.

Is that right?

MR. WALSTON: That's correct.

THE COURT: So if the practice is to remove any product from availability to the general public before it deteriorates [109] to the objectionable point, I don't see the relevance.

MR. WATSON: We think the longer shelf life is another point of relevancy, Your Honor, and that is nowhere in the statute does it say when these tests are to be made in point of time. Are they to be made in point of time the date the manufacturer puts there as the pull date? Are they to be the date of manufacture? We think it is another inconsistency in the statute and we think the shelf life therefore is important.

THE COURT: Well, I at this moment don't see the relevance.

MR. WATSON: Well, we'll keep it and see what we want to do with it. [165]

MR. WATSON: Are the Court's taste buds good this morning? I would like, with the Court's permission to produce two products after a few preliminary questions to Mr. Van Buren.

R. L. VAN BUREN

resumed the stand and testified as follows:

CROSS-EXAMINATION (RESUMED)

BY MR. WATSON: Q. Mr. Van Buren, you've determined Pantry Pride resembles a milk product, is that true?

A. Yes.

Q. And what milk product have you determined Pantry Pride resembles? A. More specifically, Milk. [166]

Q. Milk itself? A. Yes.

MR. WATSON: Mr. Walston, I guess you will stipulate this is milk?

MR. WALSTON: It looks and appears to be milk.

MR. WATSON: I'll represent it was purchased this morning in the market across the street from our office and is milk.

Q. And Mr. Van Buren, I think you can identify this other package as Pantry Pride? A. Yes.

MR. WATSON: The one on the Court's right is the Pantry Pride and the one on the left is milk. It's our contention that these products have different uses, have very distinctive flavors.

Does the Court care to comment on the record as to the Court's observations as to sight and smell?

THE COURT: Well, their appearance is very similar, that is, in color and in texture. I discern virtually no odor in either.



Do you want me to taste them also?

MR. WATSON: Yes.

(The Court tastes both samples.)

THE COURT: Well, the taste is not identical but they are similar.

MR. WALSTON: I didn't hear the Court.

THE COURT: I say, they are not identical but similar in taste.

MR. WALSTON: With respect to odor?

THE COURT: Neither has any discernible odor, to me.

MR. WATSON: Does the Court care to make any comment on the [167] differences that are noted in the taste?

THE COURT: Well, I would say that the Pantry Pride has a, in addition to typical milk taste, some very slight foreign taste, at least one I don't ordinarily associate with milk.

MR. WATSON: Do you want me to leave the samples for the Court out?

THE COURT: Oh, perhaps when they are a bit warmer, there may be some aroma that may be more discernible.

[207] REDIRECT EXAMINATION

BY MR. WALSTON: Q. Mr. Van Buren, going back to the matters that were discussed on Wednesday, there was some reference to a blind test; what were the conclusions of that test? Specifically, you might want to make reference to Exhibit 2 of Plaintiff's.

MR. WATSON: If Your Honor please, that exhibit was put in only for identification, not in evidence. We haven't had testimony from Mr. Dolan, but I have no objection to any questions that were asked

Mr. Van Buren as to his conclusions because he's a witness here today.

MR. WALSTON: Q. All right. What are your conclusions with respect to the blind test that was conducted in October, 1969? A. [Mr. Van Buren]: That I couldn't make a point of distinction between the comparable products with any degree of certainty.

Q. Specifically how many products were involved during that test? A. I believe the segregation was eight cultured products and three beverages.

Q. And what were the cultured products that were used?

A. There were the products of, the cultured products of plaintiff, a Tuttle sour cream dressing, a Borden chive sour [208] cream dressing, Carnation imitation sour cream, a Berkeley Farms sour cream, Tuttle brand sour cream, Carnation brand sour cream, and in the beverages one was a Pantry Pride product of the plaintiff and two were dairy products.

Q. Were any sample numbers indicated with respect to these samples? A. Would you explain that, Mr. Walston?

Q. Yes. Was any number indicated to you at a subsequent time for the purpose of identifying the specific products involved in the test? A. The numbers which are used on the left side of this sheet are the only numbers by which the products were identified in the blind test.

Q. Okay. And what were these numbers?

A. These numbers are the numbers of the samples on receipt into the laboratory with the first two digit "22" removed. In other words, I'm saying this; that the 22,581 sample which was received into the laboratory was a Hi-Lo brand dressing.



Q. What specific numbers were used in this test? You indicated the numbers, and would you please enumerate them?

A. 581.

Q. 581 was which product? A. Hi-Lo dressing.

Q. What was the next number? A. 582.

Q. What product was that? A. Tuttle brand sour cream dressing.

Q. What was the next number? A. 583.

Q. What was that? A. Borden brand chive sour cream.

Q. The next number? A. 584, Carnation brand [209] imitation sour cream.

586, Berkeley Farms brand sour cream.

587, Tuttle brand sour cream.

588, Carnation brand sour cream.

589, Tip Top brand Sour C dressing.

585C was Pantry Pride brand fluid product.

585A and 585B were not products received into the laboratory. They were dairy products that were merely taken from the cafeteria adjacent to the laboratory.

Q. Would you please indicate what your specific conclusion was with respect to each sample at the time that you partook of the products?

A. My findings on the basis of observation was that Hi-Lo brand I considered to be a product resembling a milk product.

I considered Tuttle brand sour cream dressing to be a dairy product.

I considered Borden brand chive sour cream dressing to be a dairy product.

I considered Carnation brand imitation sour cream to be a product resembling a milk product.

I considered Berkeley Farms brand sour cream to be a product resembling a milk product when, in fact, it was not.

I considered Tuttle brand sour cream to be a dairy product.

I considered Carnation brand sour cream to be a dairy product.

I considered Tip Top brand Sour C dressing to be a dairy product when, in fact, it was not.

In the case of the three beverages I considered a market [210] milk from the State cafeteria to be a dairy product.

I considered Pantry Pride to be a product resembling a milk product.

MR. WALSTON: Your Honor, I'd like to offer Plaintiff's Exhibit 2 into evidence at this time, with the exception that any reference made to the conclusions of Mr. P. J. Dolan should not be regarded as being received in evidence.

MR. WATSON: I'll object because there is no testimony here as to which of these conclusions were, in fact, the result of conversations between Mr. Van Buren and Mr. Dolan. It doesn't say which are Mr. Van Buren's or which are Mr. Dolan's, and furthermore, we only have bare testimony from Mr. Van Buren as to how the samples were procured. I think before this goes into evidence, you need the testimony of Mr. Dolan, as well as Mr. Stucker.

MR. WALSTON: As I say, I'm not offering this for the purpose of proving any conclusions of Mr. Dolan at the time of the blind test. With respect to counsel's first suggestion to the effect there is no differentiation between Mr. Van Buren and Mr. Dolan with respect to—



THE COURT: Well, I will admit it to the extent that it provides a convenient place to locate the results of Mr. Van Buren's testing as testified to by him, but not for the purpose of independently establishing any of the facts contained therein. It may take the same designation in evidence.

(Plaintiff's Exhibit No. 2 for identification only, now received in evidence.)

[315] GEORGE YOUNG

called as a witness on behalf of the Plaintiff, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. WATSON: Q. Mr. Young, what is your occupation?

A. I'm the owner and manager of Dairy Products Laboratories in San Francisco.

Q. What does Dairy Products Laboratories do?

A. We are a control laboratory which does quality control work for various creameries and producer groups in northern California.

Q. What type of quality control work do you do?

A. We do bacteriological testing and chemical tests on milk and dairy products in general and other food products.

Q. Do you do any work for the State of California?

A. Yes, we do.

Q. What do you do for the State of California?

A. We do some bacteriological and chemical testing on milk products which, for Marin County and Sonoma County areas, which their inspectors bring to our laboratory for these determinations.

Q. How long have you been doing that work for the State?

A. Oh, for several years. [338]

THE COURT: I assume that what you're intending to ask is whether Mr. Young has made any sensory comparative tests of Sour C or Hi-Lo with or against sour cream products?

MR. WALSTON: That's right.

MR. WATSON: Personally.

THE COURT: Yes. All right. You may answer that.

THE WITNESS: Yes, I have.

MR. WALSTON: Q. Do you recall on how many occasions did you make such tests or comparisons?

A. We made comparisons numbers of time with individual sour creams but recently did a comparison test with a number of sour creams along with one or two other filled dairy products, sour cream.

Q. What were the specific sour cream products that were involved in your test? A. Let's see. We had Carnation. We had Knudsen. We had Carnation sour cream dressing.

Q. The first Carnation you mentioned, was that Carnation [339] sour cream? A. Yes. I think really I'd have to refresh my memory on that and look on my records.

THE COURT: Do you have it here?

THE WITNESS: Yes.

THE COURT: Well, if you have it here—

THE WITNESS: May I look at it?

THE COURT: Yes.

MR. WATSON: Your Honor, may I ask bout a 60 second recess so I can go outside the appearance of



opposing counsel and discuss something in other than a whisper?

MR. WALSTON: I have no objection.

THE COURT: All right, fine. We'll recess.

MR. WATSON: It's on a very material point.

(Whereupon, a recess was taken at 3:40 p.m.)

AFTER RECESS—3:44 P.M.

MR. WATSON: Your Honor, I don't know the point we are at now with these questions without having a question read back so I can make a motion to strike the answer. I want to interpose an objection at this time to this line of questioning on the basis that there has been no foundation laid that any of the testimony elicited on direct examination as to his opinion resulted from the test which he testified he made. The test which was made was made at my request and I conceive to be work product and I do not believe, I did not ask questions about it, and I do not believe that counsel can go into those tests that I used to help me understand this case or the tests that the State made. I don't have the authorities with me but I [340] researched this in connection with another matter the other day. It was a recent case in C.A. 3d that indicates that when a witness—when my expert has become a witness, so to speak, on certain subjects, at that point it's no longer my work product that I can keep out, but to the extent that tests are made that are at my request and are simply to assist me in trial, that the test cannot come in.

Now, particularly I will state to the Court that the products involved were the ones that are Mr. Van Buren's list of samples that he tested, but I do not think this was within the scope of my direct examina-

tion and do not think it's proper cross-examination and believe that this area covers my work product.

THE COURT: Well, you took him in detail through each of the senses except sound, of course, you didn't ask him about that, but asked him as to each of those senses, how in his opinion Sour C and by his earlier testimony Hi-Lo compared with sour cream products. Now, I don't understand that it's the law that having asked that and elicited answers, you can now say that the tests which he made which may or may not, so far as we know at this point, have formed or affected the opinion that he has expressed, shall not be available on cross-examination because they are work products. I do not understand that to be the law.

MR. WATSON: Your Honor, I think I may have researched. It's 2 C.A. 3d 1, Dow Chemical case, and this indicates that, and a line of cases, the Scotsman Manufacturing and Swartzman v. Superior Court, indicate that there are additional problems [341] where the expert is going to be our witness at the time of trial but where he is an adviser to the attorney, I think that the work product rule prohibits questioning along this line of discovery.

Now, I would add that I think if another question is asked, then did he base his opinions which I asked him based on his general experience with all these products upon these tests, there is no question but what I'm wrong. If he based his opinion upon the test that he did for me, then obviously he can cross-examine, but when he has not based his opinion upon these particular tests, I don't think that it's appropriate to go into the test. I'm not trying to hide anything except that I foresee a lot of problems with this type



of evidence in this case, because I have some other witnesses that I may call who are experts for simply one or two questions who have done other work for me in connection with this case, which I don't intend to introduce in my case in chief.

THE COURT: Well, I don't understand that as a proper limitation. Let's see. If we asked Mr. Young whether the opinion that he has expressed at your invitation here on the stand was in any way based on the tests that he made at your instance and he says no, you have said you think that should close the door to pursuing the question. But, of course, the natural inference, I think, from such an answer is that the results of those tests were inconsistent with the opinion he has now expressed, and if that is true, I think that's quite clearly the sort of thing that ought to be elicited on cross-examination and it is the very purpose of cross-examination to [342] test the reliability and accuracy of the testimony that has been given, so I think I must overrule the objection.

But perhaps we could shorten this. I don't want to foreclose your going into detail but if I understand, let me ask one or two general questions:

Did the results of these tests that you say you made enter into the opinion that you formed and which you expressed to us a few minutes ago under examination by Mr. Watson?

THE WITNESS: No, they didn't.

THE COURT: Well, were the results of those tests in any way inconsistent with the opinions expressed here today?

THE WITNESS: I would say that the general results were not inconsistent with the expressions.

THE COURT: Well, how is it that you say that those tests and the results you reached didn't enter into the opinion you formed and expressed here a few minutes ago?

THE WITNESS: Well, because the opinions that I have expressed to various questions have been made over a period of time and knowledge and this is just a series of tests that we ran at the request of Mr. Watson for his information.

[454] PATRICK DOLAN

called as a witness on behalf of the Defendant, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. WALSTON: Q. Mr. Dolan, where are you employed at the present time? A. Bureau of Dairy Service, California Department of Agriculture, headquarters in Sacramento. [455]

Q. How long have you been with the Bureau of Dairy Service?

A. Since 1942, more than 28 years.

Q. What is your position with the Bureau?

A. I'm Regional Administrator of Northern California and I assist the Chief in the headquarters office.

Q. How long have you been the Regional Administrator?

A. I've been Regional Administrator since 1966.

Q. Before you were Regional Administrator, what was your position with the Bureau?

A. Prior to that I was District Supervisor, headquartered in Sacramento.

Q. How long were you employed in that position?

A. I started with the Bureau in 1942 as a Junior



Dairy Supervisor, promoted to Dairy Supervisor, promoted to Market Milk Specialist and title changed to—no, that was a promotion to Specialist in Milk and Milk Products, and in our reorganization my title changed to District Supervisor. These occurred between 1944 and 1966. I was District Supervisor, I guess—I would be guessing—six, seven years, ten years maybe.

Q. Prior to your employment with the Bureau of Dairy Service, what was your experience—strike that.

Did you have any experience in the dairy industry?

A. Yes, I had ten years of first hand experience in the dairy business. This was in a 300 cow family owned, production, processing and distribution milk business. I worked four years part time, six years full time. The last four years of employment was as manager.

Q. Would you describe your education, Mr. Dolan? [456]

A. I graduated from Del Monte High School in Southern California, attended Woodbury College for two years, majored in business administration, and after leaving the family business when I joined the Department, I've had continuous study in the scientific aspects and business practices in the dairy industry. I've attended classes at the University of California, Davis, Sacramento State College.

Q. Have you ever been a judge with respect to any dairy products, Mr. Dolan?

A. Yes, sir, for many years. I've judged dairy products at California State Fair, Los Angeles County Fair, Fresno County Fair, Merced County Fair. I've been an official judge at the Dairy Industry Conference at the University of California at Davis for many years. I was

an official in the Intercollegiate Judging Contest that was held at Davis.

Q. Do you belong to any professional organizations, Mr. Dolan?

A. Yes.

Q. Would you describe them?

A. Registered Sanitarian, I'm a member of the California Association of Dairy Milk Sanitarians, hold an office in that organization and Committee Chairman. I'm a member of the International Association of Milk, Food and Environmental Sanitarians. I'm a member of a national committee in that organization and also on the Program Committee.

Q. Mr. Dolan, have you ever participated in any tests or experiments for the purpose of comparing products manufactured by the plaintiff, to wit, Sour C, Hi-Lo and Pantry Pride?

A. Yes, I did. [457]

Q. With other milk products? A. Yes, sir.

Q. When did those tests or experiments occur?

A. This specifically, I believe it was—I'll have to refer to the date.

Q. Was there any summary that was prepared with respect to that test? A. Yes, we have a summary.

Q. I'd like to show you Plaintiff's Exhibit 2 and ask you if that is the summary to which you are referring?

A. Yes.

Q. Would you describe the, very generally, the procedures of that test, Mr. Dolan? A. Well, I was asked to participate in this. This was conducted in one of our laboratories in one of the rooms of the microbiology laboratory. The test is, when I entered the room the samples were set up on a laboratory table and there was approximately two tablespoons full of sample in



a petri dish. This is a small glass container used for making bacteria analysis. There was white paper underneath the samples and a three digit number in front of each sample.

Q. What did you proceed to do with respect to these samples?

A. We were asked in our opinion whether the products were a dairy product or a product resembling a dairy product, and our procedure, we observed these and with a spoon checked the body of the product and came to an independent decision as to whether this was a dairy product or a product resembling a dairy product.

Q. And you, in fact, tasted these products as well?

A. Yes, sir. [458]

Q. Would you describe to me, Mr. Dolan, your specific evaluations of each product?

A. Product numbered 581 I identified this product as a product resembling a milk product.

Product 582 I identified it as a dairy product.

Sample number 583 I identified as a dairy product.

Sample 584 I identified as a product resembling a milk product.

586 a dairy product.

587 a dairy product.

588 a product resembling a milk product.

589 a product resembling a milk product.

585A a dairy product.

585B a dairy product.

585C a product resembling a dairy product.

MR. WALSTON: Your Honor, it's my understanding that Plaintiff's Exhibit 2 has been admitted into evidence with respect to the first and third columns but not with respect to the second. At this point I would like to have the exhibit admitted into evidence in its entirety.

MR. WATSON: No objection, Your Honor. Stipulate that the second column may now go into evidence with his results, not the balance of it which pertains to some comments that there has been no foundation for at this point.

THE COURT: May I see the exhibit?

MR. WALSTON: Certainly.

THE COURT: Well, have we had any evidence of the source of this matter below the columns? [459]

MR. WALSTON: Perhaps I should go into that.

Q. Mr. Dolan, you will notice on Plaintiff's Exhibit 2 at the bottom of that exhibit certain comments with respect to each sample; who prepared those comments?

A. Well, these comments were jointly arrived at between Mr. Van Buren and myself after we had finished our evaluation of the products. We evaluated the products independently, made a record of these, and then discussed the products between the two of us, and you start out with a first one, and naturally you compare the second one to the first, and the third with the first and second, and such.

Q. Who specifically authored the comments, Mr. Dolan? Was that you or Mr. Van Buren?

A. Well, I believe we had jointly made notes from this and this was dictated to one of the secretaries, and when it was put together and presented to me I was entirely in agreement with it.

MR. WALSTON: Now, I'd like to offer it in its entirety, Your Honor.

THE COURT: May I see it, then, please?

MR. WALSTON: Certainly.

THE COURT: I'm not sure I understand yet, Mr. Dolan, what you mean. For example, here the first entry in this lower part of the page is "581—General



appearance of sour cream. Off-white, pleasant acidity." Now, whose language is that?

THE WITNESS: Well, this is—whether it's Van Buren's words or mine, it this your point? [460]

THE COURT: Or somebody else's. I simply would like to know the source.

THE WITNESS: This is terminology we would use in describing a product and this is the product being off-white with a slight acidity in favor. This would be a description of it. We arrive at this, if you and I were evaluating a food product here and you would agree on the terminology of it. Those are standard means of describing sour cream, for instance.

THE COURT: Yes. But I see from looking at these columns up above that you and Mr. Van Buren reached differing conclusions as to apparently three of these products, is that right?

THE WITNESS: Yes, that's correct.

THE COURT: And yet when we look down at the bottom here as to those products on which you disagree, it appears to be a single expression of opinion. Do you mean that you agreed on what you found and yet disagreed on the conclusions you drew from the findings?

THE WITNESS: We agreed on the appearance and body of the product. I had no knowledge of whether he felt it was a dairy product or a product resembling a milk product. He had no knowledge of my opinion, and actually I can't, with any degree of confidence in most of these products, differentiate one from the other with a degree of certainty. In my profession if I'm asked to say one as another, I want a laboratory analysis of it, because we made a judgment opinion because you have a choice of one or the other, but I didn't have any degree of confidence whether I was

right in 100 per cent or [461] 50 per cent of the cases. I didn't know. This is just what I thought. But I agreed in the general appearance of it; when we observed these we agreed that there was a slight difference in color when you compare one to another, and this happens in many dairy products, there's variations. It isn't noticed because you don't put them side by side, but when you put them side by side, quite often the color will range quite a ways. Even with milk the color will vary when you compare one with the other.

THE COURT: Well, now, take the comment on 588, Mr. Van Buren concluded that that was a dairy product and, in fact, it apparently turned out to be a dairy product. The comment as to 588, "Body similar to 582," and you see 582 is also identified as a dairy product, and I guess was, "but firmer than 587," which also is identified as a dairy product and was, in fact, sour cream. "Slight acidity flavor. Has the appearance and taste of sour cream." Now, all of that is consistent with Mr. Van Buren's conclusion that that was a dairy product, and I would expect that. But your conclusion as to 588 was that it was a product resembling a milk product, and so I don't see how 588, how the description that I've just read, could represent equally accurately and fully your findings and Mr. Van Buren's findings. And that's what I'm trying to understand, whether, in fact, as I now understand you to say, these were findings you both made or whether this was something one or the other of you made or some kind of composite, and if it was a composite, I don't see how, as to those on which you disagree, that it could ever be brought together. [462]

THE WITNESS: Well, those descriptions was a composite. However, I have seen products resembling



milk products that are used, like sour cream, I can't differentiate between them. They have the body, they appear to have a similar color and a similar taste and we're trying to evaluate between one and the other and this one, and in my judgment I put in the product resembling milk products class.

THE COURT: Is there anything from this sheet which would reveal to us why, as to that product, for example, the 588 sample, you felt that it was not a dairy product?

THE WITNESS: Well, it was just my evaluation of this that—you see I had made my judgment prior to our discussing of this appearance. We evaluated these separately. We made our record and the record was not changed. It was maybe later that day or even the next day before we knew the true identity. At the time we discussed these and evaluated them, we didn't have any knowledge of the true identity of the products.

THE COURT: Oh, yes, I understand that, and I'm not attempting to question your judgment and how you arrived at it. One of the attorneys has offered this document in evidence and the other has objected to a portion of it, and I am simply trying to satisfy myself with whether this has any business being before us and that's what I'm intending to question you about.

Well, I, from Mr. Dolan's testimony, I don't see that the lower half of this can be said to have originated with either of these gentlemen or to accurately reflect the findings of either of them. The portion of the document that I've admitted [463] and the second column which I will now admit will not be admitted for the purpose of independently tending to establish any matter therein contained but simply as being a convenient place for us to locate the testimony of Mr.

Van Buren and Mr. Dolan on the subject, and I think at this point that the bottom half is not of service.

MR. WALSTON: Well, I think there is nothing inconsistent between the documents made in the lower half and Mr. Dolan's testimony. Mr. Dolan, in fact, only missed one product and that was as Your Honor has indicated, number 588. I would remind the Court that 588 is Carnation brand sour cream, which is the same product that Mr. Young testified to as being in his opinion quite uncharacteristic of a true sour cream. I would also remind the Court that Carnation sour cream, the same product was sampled by the Court. The Court indicated that in its own evaluation Sour C tasted more like sour cream than did Carnation sour cream.

THE COURT: Yes.

MR. WALSTON: So number 588 comments pursuant thereto indicate that there are quite dissimilarities between 588 and 587, to wit, the body of 588 was —quote—"firmer than 587." So for that reason I don't think there is anything inconsistent. There is the conclusion it has the appearance and taste of sour cream, which would be merely a conclusion anyway, of course. I think for that reason that the comments are both relevant and consistent with the specific conclusions that are contained in the earlier part of the exhibit.

THE COURT: Well, if it provides a consistency as to Mr. [464] Dolan, his conclusions, then it necessarily provides inconsistency as to Mr. Van Buren, doesn't it?

MR. WALSTON: No. Let me see this.

THE COURT: Well, let's take an illustration. You've just said that the comment as to 588 reveals



a reason for Mr. Dolan's concluding that it was not a dairy product because it says it was firmer than 587.

MR. WALSTON: But also in 588 the comment is made—quote—"Body similar to 582". 582, of course, is a dairy product. It seems to me that these comments indicate some feeling of the nuance of this particular test and show a lot of these products have the characteristics of both a dairy product and of a nondairy product.

THE COURT: They might very well if either Mr. Dolan or Mr. Van Buren would claim all of them, but I don't think that's the state of the record. The top half at this point will be admitted for the limited purpose I indicated.

MR. WALSTON: Q. Mr. Dolan, based upon your evaluations in this test to which you've referred and based generally upon your experience and training and education in the field of milk products, do you have an opinion as to whether there is any sensory resemblance between Sour C and sour cream products in respect to appearance only?

A. Generally speaking, they are very similar in appearance.

Q. Would you have an opinion as to resemblance, if any, between those products in terms of taste?

A. They are very similar.

Q. Would you have an opinion between those products in terms [465] of color? A. They are similar. Sour cream may vary more in color. Some of it is a deeper color. Some of it is white. My observation of Sour C in most cases is closer to white than—it remains pretty much in this category.

Q. Do you have an opinion between, as to the resemblance, if any, between those products in terms of texture?

A. Texture and body is very similar.
Q. Do you have an opinion respecting those products in terms of smell? A. It has a slight acidity odor.
Q. I'm sorry. A. It has a slight acidity odor, very similar to sour cream. This is what is desirable in the products, and the products aren't always perfect.
Q. Would your answers be the same as you have indicated if I were to ask your opinion as to the resemblance, if any, between Hi-Lo and sour cream in respect to all the sensory characteristics I mentioned?
A. I haven't observed an appreciable difference between Hi-Lo and Sour C. They appear to be very similar to me.
Q. Would your answers be the same if I were to ask your opinion as to the resemblance, if any, between Pantry Pride and fluid milk in respect to the foregoing sensory characteristics?
A. We compared, or were told one of samples we evaluated was Pantry Pride, one of them was milk, and in addition, to get a key, since I had three samples and I didn't know which was which, I went out to the State cafeteria and obtained a glass of milk and used it as my base guide, and the products were very similar in appearance, their characteristics in a glass as you [466] would slosh it around in the glass. I thought I detected a slight flavor that in my opinion probably orginated from the vegetable oil in the product, very, very slight level, and I questioned whether anyone that isn't real selective in this would pick up, and this was actually the only point that I differentiated between the two and thought there might be a slight feed flavor in the milk, which is considered a defect.

MR. WATSON: I'll move to strike the entire answer as being nonresponsive. He was asked whether or



not he would answer the same as to the other questions, and his other questions were based on his experience during the period, and now he has gone back beyond the test, because he went to the cafeteria and got some milk.

THE COURT: Well, the answer at this point may stand, but I don't know that the actual question has been answered.

I don't understand by what you said whether you were able to distinguish Pantry Pride from milk products.

THE WITNESS: I identified them as they were, Pantry Pride as a product resembling milk product, and the milk as a milk product.

## Exhibit Two in Evidence, Tip Top Foods, Inc. v. Lyng, 1st Civ. 30639.

October 10, 1969

Mr. C. L. Stucker, Dairy Microbiologist, provided eight samples of products in petri dishes. The products were semi-solid and white and on initial tasting were all found to be acidified products; either dairy products or products resembling milk products. The samples were submitted to P. J. Dolan and R. L. Van Buren, who had no knowledge as to whether or not the products were all dairy products, all products resembling milk products, or a commingling of both.

In addition, to the eight samples of products in the semi-solid state, three samples were submitted in the fluid state with no identification other than numbers. Neither Mr. Dolan nor Mr. Van Buren had any knowledge as to whether or not all three products were milk products, products resembling milk products, or a commingling of both.

| Sample | R. L. Van Buren | P. J. Dolan | Identity |
|---|---|---|---|
| 581 | Products Resembling Milk Products | Products Resembling Milk Products | "Hi-Lo" brand dressing (PRMP) |
| 582 | Dairy Product | Dairy Product | "Tuttle" brand sour cream dressing (DP) |
| 583 | Dairy Product | Dairy Product | "Borden" brand chive sour cream dressing (DP) |
| 584 | Products Resembling Milk Products | Products Resembling Milk Products | "Carnation" brand imitation sour cream (PRMP) |
| 586 | Products Resembling Milk Products | Dairy Product | "Berkeley Farms" brand sour cream (DP) |
| 587 | Dairy Product | Dairy Product | "Tuttle" brand sour cream (DP) |
| 588 | Dairy Product | Products Resembling Milk Products | "Carnation" brand sour cream (DP) |
| 589 | Dairy Product | Products Resembling Milk Products | "Tip Top" brand Sour Cream dressing (PRMP) |
| 585A | Dairy Product | Dairy Product | Market Milk from State Cafeteria (DP) |
| 585B | Dairy Product | Dairy Product | Market Milk from State Cafeteria (DP) |
| 585C | Products Resembling Milk Products | Products Resembling Milk Products | "Pantry Pride" brand fluid product (PRMP) |

581 — General appearance of sour cream. Off-white, pleasant acidity.
582 — Appeared to be thinner than some, but regained form on spooning. Deeper color than 581. Slightly yellowish.
583 — Retains form. Chives added, slightly salty, lower acidity than 581, a distinct chive flavor.
584 — Retains form, slightly whiter by comparison with some other samples, compared with 582.
586 — Retains form, body similar to 581, slightly curdy, definite lack of flavor.
587 — Body similar to 582, lactic flavor pleasant, general appearance of sour cream.
588 — Body similar to 582, but firmer than 587. Slight acidity flavor. Has the appearance and taste of sour cream.
589 — Body like 582, mild acid flavor, retains form fairly well and color was whiter than 581.
585 — All products (beverages) were similar in characteristics, except there was a difference in A and C. In A it was attributed to a dairy product defect, and in C it was flat and had a slight foreign flavor. All products were indistinguishable in appearance. They all coated the glass when sloshed around just as you would expect milk to. As re-relating [*sic*] to the cultured products, we could not differentiate between the products with any degree of certainty.

R. L. Van Buren, Chief
Bureau of Dairy Service
/s/ R. L. Van Buren

P. J. Dolan, Regional Administrator
Bureau of Dairy Service
/s/ P. J. Dolan



ORIGINAL

APPENDIX G.

FILED

JAN 2 - 1974

CLARENCE E. CASELL, County Clerk

EVELLE J. YOUNGER, Attorney General
CARL BORORAY,
Assistant Attorney General
WALTER E. WUNDERLICH,
JEFFREY C. FREEMAN,
E. ROBERT WRIGHT,
Deputy Attorneys General
600 State Building
Los Angeles, California 90012
Telephone: (213) 620-4620

Attorneys for Defendants
JERRY W. FIELDER, as Director of Agriculture of the State of California; R. L. VAN BUREN, as Chief of the Bureau of Dairy Service of the Department of Agriculture of the State of California; L. H. LOCKHART, as Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

COFFEE-RICH, INC., a Delaware corporation, and RICH PRODUCTS CORPORATION, a Delaware corporation,

Plaintiffs,

v.

JERRY W. FIELDER, as Director of Agriculture of the State of California, et al.,

Defendants.

No. 943 548

MODIFIED JUDGMENT
(Permanent Injunction)

The above entitled action came on regularly for trial on September 15, 1969, in Department 68 of the above entitled Court, the Honorable Samuel L. Kurland, Judge presiding. Plaintiffs Coffee-Rich, Inc., and Rich Products Corporation appeared by Flint and MacKay by Edwin Preston and Louis W. Myers II, and Arnall, Golden and Gregory of Counsel by Ellis Arnall and Elliott H. Levitas. Defendants Richard Lyng and Jerry W. Fielder, as Directors of Agriculture of the State of California; R. L. Van Buren, as Chief of the Bureau of Dairy

Service of the Department of Agriculture of the State of California; and L. H. Lockhart, as Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California, appeared by Thomas C. Lynch, Attorney General; Walter S. Rountree, Assistant Attorney General; Walter E. Wunderlich and John C. Hamilton, Deputy Attorneys General, by Walter S. Rountree, Assistant Attorney General; Walter E. Wunderlich and John C. Hamilton, Deputy Attorneys General. A dismissal was filed as to all fictitiously named defendants.

Evidence both oral and documentary was received to and including October 2, 1969. After arguments on October 16, 1969, the cause was submitted as of December 1, 1969, for decision. By memorandum decision dated March 27, 1970, the Court indicated its intended decision. On February 2, 1971, the Court caused Findings of Fact and Conclusions of Law and Judgment (Permanent Injunction) to be filed. On February 3, 1971, the Judgment (Permanent Injunction) was entered.

An appeal was thereafter taken from the Judgment (Permanent Injunction). On September 19, 1972, the Court of Appeal, Second Appellate District, Division Two, filed its Opinion in the matter of Coffee Rich, Inc. v. Fielder, 2nd Civil No. 38748 (27 Cal.App.3d 792). The decision of the Court of Appeal reversed the Judgment (Permanent Injunction) entered herein on February 3, 1971, and remanded the matter to this Court with directions to modify the Findings of Fact, Conclusions of Law and Judgment (Permanent Injunction) in terms consistent with the opinion of the Court of Appeal.

The Court having made and filed its Modified Findings of Fact and Conclusions of Law, and good cause appearing therefor,





IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. With the exception of those matters set forth in paragraph 2 below, Statutes 1968, Chapter 1250, is a valid exercise of the State's police power under the California and United States Constitutions and applies to plaintiffs' products, "Coffee-Rich" in hard-frozen form or said hard-frozen form as thawed (but not powdered "Coffee-Rich"), "Rich's Whip Topping," "Sundi-Whip" and "Spoon n' Serve."

2. The following provisions of the Agricultural Code enacted by Statutes 1968, Chapter 1250, are invalid and may not constitutionally be applied to plaintiffs and plaintiff's products "Coffee-Rich," "Rich's Whip Topping," "Sundi-Whip" and "Spoon n' Serve":

(a) Section 38904 insofar as it provides that no products resembling milk products shall be used in penal institutions or charitable institutions receiving state assistance.

(b) Section 38905 requiring certain establishments serving meals to post signs or provide menu notices of specified minimum sizes stating "Beverages and products which are not milk products are served here."

(c) Sections 38931 through 38937 to the extent that they require plaintiffs to obtain licenses for their manufacturing plants located outside the State of California.

3. The defendants, Jerry W. Fielder as Director of the Department of Agriculture of the State of California, and R. L. Van Buren as Chief of the Bureau of Dairy Service of the Department of Agriculture of the State of California, and L. H. Lockhart as Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of

California, and each of them, their successors, employees, agents and subordinates are hereby permanently restrained and enjoined from enforcing or attempting to enforce the provisions of Statutes 1968, Chapter 1250, which have hereinabove been declared to be invalid as against any of plaintiffs' said products.

4. Except as hereinabove expressly declared to be invalid or inapplicable to plaintiffs' said products, the Court declares that each of the provisions of Statutes 1968, Chapter 1250, herein in issue is valid and to the extent provided in said statute is applicable to plaintiffs' said products, and plaintiffs are not entitled to a permanent injunction in respect to the enforcement thereof.

5. Each party shall bear its own costs of suit herein.

DATED: JAN 2 - 1974

E. C. Garland
JUDGE OF THE SUPERIOR COURT





DECLARATION OF SERVICE BY MAIL

I, Betty J. Bosnich, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 555 Capitol Mall, Suite 550, Sacramento, California.

On December 19, 1973, I served the attached

MODIFIED JUDGMENT (Permanent Injunction)

by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

ARGUE, FRESTON & MYERS
Edwin Preston
Louis W. Myers, II
626 Wilshire Boulevard, 10th Floor
Los Angeles, California 90017

ARNALL, GOLDEN & GREGORY
Ellis Arnall
Elliott Levitas
Fulton Federal Building, 10th Floor
Atlanta, Georgia 30303

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 19, 1973 at Sacramento, California.

Betty J. Bosnich
Declarant

## APPENDIX H.

In the Court of Appeal, Second Appellate District, State of California.

Entered Aug. 18, 1975.
Book 6887 Page 026.
By E. Nieman Deputy.

Coffee-Rich etc., et al., Plaintiffs, Respondents and Appellants, vs Jerry W. Fielder etc. et al., Defendants, Appellants, and Respondents. No. 44921, S. C. No. 943548.

REMITTITUR

On Appeal from the Superior Court in and for the County of Los Angeles.

Filed: Aug. 18, 1975.

*The above-entitled cause having been fully argued, submitted and taken under advisement,* IT IS ORDERED, ADJUDGED AND DECREED *by the Court that* the judgment is affirmed. Respondents to recover costs on appeal.

I, Clay Robbins, Jr., *Clerk of the Court of Appeal, Second Appellate District, State of California, do hereby certify that the foregoing is a true copy of an original judgment entered on June 9, 1975, and now remaining of record in my office.*

Dated: August 11, 1975.

CLAY ROBBINS, JR., *Clerk*
By ..... *Deputy*

## APPENDIX I.

*Los Angeles, Cal.* July 3, 1975

TITLE:

Coff-Rich vs. Fielder. *No.* 44921.

The Court: Petition for rehearing denied.

Clay Robbins, *Clerk*

**APPENDIX J.**

CLERK'S OFFICE, SUPREME COURT
4250 State Building
SAN FRANCISCO, CALIFORNIA 94102

Aug. 6, 1975

*I have this day filed Order hearing denied.*

*In re: 2 Civ. No.* 44921 Coffee-Rich, Inc., et al. *vs.* Fielder, et al.

*Respectfully,*

G. E. BISHEL
*Clerk*

## APPENDIX K.

In the Court of Appeal of the State of California, Second Appellate District.

Coffee-Rich, Inc., a Delaware corporation, and Rich Products Corporation, a Delaware corporation, Plaintiffs and Appellants, vs. Jerry W. Fielder, as Director of Agriculture of the State of California; R. L. Van Buren, as Chief of the Bureau of Dairy Service of the Department of Agriculture of the State of California; L. H. Lockhart, as Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California, Defendants and Appellees. 2D Civil No. 44921.

Filed Oct. 9, 1975, Clerk's Office Court of Appeal Second Appellate District.

### NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Coffee-Rich, Inc., a Delaware corporation, and Rich Products Corporation, a Delaware corporation, the appellants above-named, and each of them, hereby appeal to the Supreme Court of the United States from the judgment of the Court of Appeal of the State of California, Second Appellate District, Division One, affirming the judgment of the Superior Court of the State of California for the County of Los Angeles, entered in this action on June 9, 1975.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

ELLIS ARNALL
of
ARNALL, GOLDEN & GREGORY

EDWIN FRESTON
LOUIS W. MYERS II
MARK A. SPRAIC
of
ARGUE, FRESTON & MYERS

By Edwin Freston
Edwin Freston



## AFFIDAVIT OF SERVICE BY MAIL

State of California, County of Los Angeles—ss.

I, Joanne Dolan, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; my business address is 626 Wilshire Boulevard in the City of Los Angeles, County of Los Angeles, State of California.

On October 9, 1975, I served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on all parties required to be served by depositing a true copy thereof, together with a copy of this Affidavit, enclosed in a sealed envelope with first-class United States postage thereon fully prepaid, in a mailbox regularly maintained by the United States Postal Service at 626 Wilshire Boulevard, in the City of Los Angeles, California 90017, addressed to the attorneys of record for said parties at the office address of said attorneys, as follows:

1. Evelle J. Younger, Attorney General Carl Boronkay, Assistant Attorney General Walter E. Wunderlich, Deputy Attorney General, 555 Capitol Mall, Suite 550 Sacramento, California 95814 Telephone: (916) 445-4297

Attorneys for Defendants and Appellees

/s/ Joanne Dolan
Joanne Dolan

Subscribed and sworn to before me this 9th day of October, 1975.

/s/ Dorothy L. Rutherford
Notary Public in and for said
County and State

IN THE

# Supreme Court of the United States

October Term, 1975
No. 75-666

COFFEE-RICH, INC., a Delaware corporation, and RICH PRODUCTS CORPORATION, a Delaware corporation,
*Appellants,*

*vs.*

JERRY W. FIELDER (appointed as Successor to RICHARD LYNG), as Director of Agriculture of the State of California; R. L. VAN BUREN, as Chief of the Bureau of Dairy Service of the Department of Agriculture of the State of California; L. H. LOCKHART, as Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California,
*Appellees.*

**On Appeal From the California Court of Appeal, Second Appellate District, Division One.**

## PETITION FOR REHEARING.

ELLIS ARNALL,
Fulton Federal Building, Tenth Floor,
Atlanta, Georgia 30303,
(404) 577-5100,
*Counsel for Appellants.*

*Of Counsel:*
ARNALL, GOLDEN & GREGORY,
Tenth Floor,
Fulton Federal Building,
Atlanta, Georgia 30303,
(404) 577-5100,

EDWIN FRESTON,
LOUIS W. MYERS, II,
MARK A. SPRAIC, of
ARGUE, FRESTON & MYERS,
626 Wilshire Boulevard,
Los Angeles, Calif. 90017,
(213) 628-1291.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

## SUBJECT INDEX



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## TABLE OF AUTHORITIES CITED

### Cases



### Statutes

IN THE

# Supreme Court of the United States

October Term, 1975
No. 75-666

COFFEE-RICH, INC., a Delaware corporation, and RICH PRODUCTS CORPORATION, a Delaware corporation,

*Appellants,*

*vs.*

JERRY W. FIELDER (appointed as Successor to RICHARD LYNG), as Director of Agriculture of the State of California; R. L. VAN BUREN, as Chief of the Bureau of Dairy Service of the Department of Agriculture of the State of California; L. H. LOCKHART, as Regional Administrator of the Bureau of Dairy Service of the Department of Agriculture of the State of California,

*Appellees.*

**On Appeal From the California Court of Appeal, Second Appellate District, Division One.**

## PETITION FOR REHEARING.

Appellants herein respectfully petition this Court for an order vacating its order of January 12, 1976, dismissing the within Appeal for lack of jurisdiction and denying certiorari and either noting probable jurisdiction or in the alternative treating the jurisdictional statement as a petition for a writ of certiorari and granting such petition. As grounds for the within petition appellants state as follows:

This appeal presents significant and substantial issues which are also pending in another case arising under California law and presently before this Court.

In *California State Board of Pharmacy et al. v. Shirley Terry etc. et al.* No. 75-336 this Court is presented with an appeal from a Three-Judge District Court in the Northern District of California. In *Terry*, the District Court dealt with a statute restricting advertising in connection with prescription drugs and held (1) that the commercial speech proscribed was subject to protection under the First Amendment to the United States Constitution as made applicable to the States by the Due Process Clause of the Fourteenth Amendment and (2) found that the law was unconstitutionally vague in large part by reason of "the defendants' inconsistent attempts to elucidate the scope of the statute." (395 F.Supp. 64 at 107.)

This Court is now also in the process of dealing with the parameters of the First Amendment right to free speech in a marketing context in the case of *Virginia Citizens Consumer Council Inc. v. State Board of Pharmacy*, 373 F.Supp. 683 (E.D. Va. 1974), *prob. Juris. noted* 420 U.S. 971 (1975), No. 74-895. As with *Terry*, the Court is being called upon to determine whether or not a state statute proscribing the provision of important consumer information through the advertising media is constitutionally infirm as a wrongful deprivation of the First Amendment right of free speech and its companion, the public's "right to know." (373 F.Supp. at 687.)

*Coffee-Rich* likewise presents the issue of whether a state statute in California which regulates and limits the labeling of food products* is unconstitutionally vague and whether such restrictions have the effect

**Terry* found that the type of commercial speech involved was informational rather than "promotional" since the advertising involved did not have the effect of creating a desire for prescribed medicine but rather afforded the consumer the basis for making an intelligent price choice between different sellers. *Coffee-Rich* likewise presents the issue in the context of Chapter 1250 on its face of whether consumers shall be given sufficient label information to make intelligent buying decisions as between one product and another.



of "chilling" the exercise of First Amendment rights applicable under the Due Process Clause.

At the time of the filing of *Coffee-Rich* and during early proceedings it appeared that First Amendment rights in the commercial context were the subject of very limited protection. Absent the applicability of the First Amendment this Court has consistently refused to consider attacks against statutes on their face on the ground of vagueness. *United States v. National Dairy Prod. Corp.*, 372 U.S. 29, 36 (1963). In recent years the doctrine enunciated in *Valentine v. Chrestensen*, 316 U.S. 52 (1942) and *Breard v. City of Alexandria*, 341 U.S. 622 (1951), both dealing with commercial speech in a promotional context, has been questioned and eroded in decisions bringing within the umbrella of First Amendment protection "commercial" situations earlier thought to be without protection.

In *Terry* the statute was found to be subject to the First Amendment although dealing with advertisements. First Amendment issues presented in *Coffee-Rich* deal strictly with labeling in the context of the present case and are thus of a more *informational* nature than the protected speech in *Terry*.

In *Terry* the defendant State's counsel made inconsistent arguments to the court with respect to the application of the statute, yet according to appellants in *Terry*, the administrator's "interpretation has never altered since the statute was enacted." (*Terry*, Juris. St. p. 18.) The inconsistency of counsel's position, alone, was found a sufficient basis to invalidate the

statute as being unconstitutionally vague. In *Coffee-Rich* not only were counsel for the administrator inconsistent in construing the statute, but the administrator himself was inconsistent in numerous critical points in his interpretation of the law. (*Coffee-Rich* Juris. St. pp. 24-26.) In spite of the more aggravated inconsistencies in *Coffee-Rich*, the act was upheld.

Appellants submit that if the subject of the statutes in *Terry* are within First Amendment protection, then the statutes in *Coffee-Rich* are subject to similar scrutiny. The question of vagueness must be considered to determine whether Chapter 1250 may deter the constitutionally protected and socially desirable conduct of informing consumers. Since *Terry* comes before the Court following the invalidation of state law and *Coffee-Rich* is presented in the context of state laws being upheld (at least in the context of the instant appeal) these two cases should be considered together.

Appellants should not be required by this Court to submit to this unconstitutional law and be subject to the fiat of an administrator who construes the law in a different fashion from day to day guided by counsel who cannot determine what the law means.

**Conclusion.**

In light of the foregoing, Appellants submit that this Appeal does present substantial federal questions which may be determined by this Court at the present time and need not be left to consideration after the statute has been applied.

Respectfully submitted,

ELLIS ARNALL,
*Counsel for Appellants.*

**Certificate of Counsel.**

As counsel for the Appellants, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

EDWIN FRESTON,
*Counsel for Appellants.*